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No. 05-

IN THE SUPREME COURT OF THE UNITED STATES

DARREL G ADAMS, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

JAVIER ZAMORA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

In direct conflict with published decisions by the Second, Sixth, Seventh, Eighth, and Tenth Circuits, the United States Court of Appeals for the Ninth Circuit recently held: (1) the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 59-60 (2004) (the Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her), is a watershed rule of criminal procedure that applies retroactively to final state judgments under *Teague v. Lane*, 489 U.S. 288 (1989); and (2) the retroactivity exceptions of *Teague* are incorporated into 28 U.S.C. § 2254. *Bockting v. Bayer*, 399 F.3d 1010, 1014-21 (9th Cir. (Nev.) 2005), *petition for cert. filed* 2005 WL 3038541 (Nov. 5, 2005) (No. 05-595).

Relying on its *Bockting* decision, the court of appeals held in this habeas corpus case that the California courts' pre-*Crawford* rejection of an admissibility claim concerning out-of-court statements by an unavailable witness was "contrary to" established precedent of this Court, as made retroactive under *Teague*. The question presented is:

Whether *Crawford* applies retroactively in federal habeas corpus proceedings, under *Teague* or 28 U.S.C. § 2254(d), to a state court decision rendered prior to *Crawford*.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-

DARREL G. ADAMS, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

JAVIER ZAMORA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Darrel G. Adams, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals (Pet. App. 1-4) and the district court (Pet. App. 5-44) are unpublished. The opinion of the California Court of Appeal (Pet. App. 46-67) is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Gang member Hugo Cruz was beaten and shot by four fellow gang members over a drug money dispute. He made statements to police concerning the attackers, one of whom was Zamora, at the crime scene, in the hospital two days later, and during questioning after being arrested for a firearm offense.

1. *State Court Proceedings*

Cruz refused to testify at Zamora's Los Angeles County Superior Court trial, and his statements to police were admitted as those of an unavailable witness under California Evidence Code section 1370. The jury subsequently convicted Zamora

and a codefendant of attempted murder, assault with a firearm, attempted robbery, and assault by means likely to produce great bodily injury. The trial court sentenced Zamora to state prison for a term of twenty-nine years.

Zamora appealed and claimed, inter alia, that Cruz's statements were inadmissible under California Evidence Code section 1370, and that the introduction of the statements violated Zamora's right of confrontation. On October 11, 2001, the California Court of Appeal affirmed the judgment, but struck an erroneously imposed sentencing enhancement. The court rejected Zamora's claims concerning the admissibility of Cruz's statements, and found no Confrontation Clause error because the statements were trustworthy and bore "indicia of reliability." Pet. App. 54-55. The California Supreme Court declined to hear a further appeal. Pet. App. 45.

2. *District Court Proceedings*

Zamora then filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the federal district court. He claimed, inter alia, that the trial court violated his constitutional right of confrontation in admitting the victim's statements under the hearsay exception of California Evidence Code section 1370. Pet. App. 13. Adopting the report and recommendation of the federal magistrate, the district court granted a writ of habeas corpus on this claim, finding that the state had not proved Cruz's unavailability and that the statements lacked sufficient indicia of reliability. Pet. App. 5, 15-33.

3. *Proceedings on Appeal*

The Warden appealed to the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and

the defendant had a prior opportunity to cross-examine him or her).

On February 22, 2005, the Ninth Circuit held in *Bockting v. Bayer* (1) that the rule announced in *Crawford* is a watershed rule that applies retroactively to final state court judgments under *Teague v. Lane*, 489 U.S. 288 (1989), and (2) that the retroactivity exceptions of *Teague* were incorporated into the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. *Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir. (Nev.) 2005), *petition for cert. filed* 2005 WL 3038541 (Nov. 5, 2005) (No. 05-595).

Applying its *Bockting* decision, the Ninth Circuit held in this case that the decision of the California Court of Appeal was "'contrary to' established Supreme Court precedent in *Crawford*, as made retroactive under *Teague*." Finding the error to be prejudicial, the court affirmed the issuance of the writ. Pet. App. 3.

REASONS FOR GRANTING REVIEW

The Ninth Circuit's holdings—that *Crawford* applies retroactively under *Teague*, and that *Teague*'s retroactivity exceptions were incorporated into 28 U.S.C. § 2254(d)—have created an intolerable circuit split on recurring issues of national importance. This Court's immediate intervention is required to resolve these issues and to ensure uniformity of federal law.

A. THE COURTS OF APPEALS ARE IN CONFLICT OVER WHETHER *CRAWFORD* APPLIES RETROACTIVELY TO FINAL STATE JUDGMENTS

The Ninth Circuit's decision to apply *Crawford* retroactively to final state judgments on collateral review directly conflicts with published opinions of the Second, Sixth, Seventh, Eighth,

and Tenth Circuits, each of which has held that *Crawford* does not apply retroactively to such cases and does not fall within the exceptions of *Teague*, 489 U.S. 288. *See Bintz v. Bertrand*, 403 F.3d 859, 866 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 174 (2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327, 334-36 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1936 (2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 940 (2005); *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 902 (2005).[1]

Relief would have been denied had the instant petition been filed in any of the 23 states where the Circuit Courts have found *Crawford* does *not* apply retroactively to final state court judgments. Basic principles of fairness dictate that our criminal justice system should not tolerate such inconsistent rules, and this Court should grant certiorari to provide uniformity of law. Sup. Ct. R. 10(a).

B. THE PETITION PRESENTS A RECURRING QUESTION OF NATIONAL IMPORTANCE

The question presented in this case is also of great public importance and warrants immediate resolution. As observed by the nine judges who dissented from the denial of rehearing en banc in *Bockting*, the Ninth Circuit's unique interpretation of *Crawford* "will have serious consequences" for "it will open the

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1. Many state appellate courts have also held that *Crawford* is not retroactive to cases on collateral review: *In re Moore*, 34 Cal. Rptr. 3d 605, 612 (Ct. App. 2005); *Danforth v. State*, 700 N.W.2d 530, 531 (Minn. Ct. App. 2005); *In re Markel*, 111 P.3d 249, 254 (Wash. 2005); *State v. Williams*, 695 N.W.2d 23, 29 (Iowa 2005); *People v. Soto*, 795 N.Y.S.2d 429, 431-33 (N.Y. Sup. Ct. 2005); *People v. Edwards*, 101 P.3d 1118, 1124 (Colo. App. 2004); *but see State v. Forbes*, 119 P.3d 144, 149 (N.M. 2005) (retroactive under "unique facts and procedural posture").

door for a slew of habeas petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements." Before *Crawford*, hearsay testimony not subject to cross-examination was regularly admitted if it bore sufficient "indicia of reliability," as set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). If the Ninth Circuit's interpretation of *Crawford* is allowed to stand, however, state and federal prisoners will likely file thousands of habeas petitions challenging convictions on *Crawford* grounds. Even if the state and federal officials charged with defending such litigation ultimately prevail in most cases under the harmless error doctrine, the cost to the judicial system will be immense. *See Beard v. Banks*, 542 U.S. 406, 413 (2004) ("'In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.'") (quoting *Teague*, 489 U.S. at 310) (citation omitted).

C. THE NINTH CIRCUIT'S HOLDING THAT *CRAWFORD* APPLIES RETROACTIVELY TO FINAL STATE JUDGMENTS IS CLEARLY ERRONEOUS

The Ninth Circuit's unique interpretation of *Crawford* is clearly erroneous. As explained in the opinions of numerous federal circuits and the dissenting opinions in *Bockting* itself, *Crawford* does not set forth a watershed rule of criminal procedure, and therefore its retroactive application to a final state judgment violates *Teague*, 489 U.S. 288.

Under the *Teague* doctrine, 489 U.S. at 310, a "new rule" of constitutional law will not be applied retroactively on collateral review, subject to two exceptions. *See Stringer v. Black*, 503 U.S. 222, 227 (1992). The "new rule" limitation on habeas

review by federal courts "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

A three-step test determines whether *Teague*'s new rule prohibition applies. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). First, the court must ascertain when the defendant's conviction became final on appeal. A conviction becomes final for purposes of *Teague* at the expiration of the time within which to petition for writ of certiorari on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Here, Zamora's conviction became final on April 2, 2002, nearly two years before this Court decided *Crawford*.[2/]

Second, the court must determine whether the rule the petitioner seeks to apply is "new" in the sense that it "imposes a new obligation on the States" or produces a result "not dictated by precedent existing at the time the defendant's conviction became final." *Caspari*, 510 U.S. at 390; *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *Sawyer v. Smith*, 497 U.S. 227, 234 (1990); *Teague*, 489 U.S. at 301.

It cannot be doubted that *Crawford* announced a new constitutional rule of criminal procedure.[3/] In *Ohio v. Roberts*, 448 U.S. at 66-70, this Court held that hearsay statements

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2. Zamora's conviction became final on April 2, 2002, upon the expiration of time to file a petition for writ of certiorari following the California Supreme Court's affirmance of the judgment and denial of review. 28 U.S.C. §§ 1257, 2101(d); Sup. Ct. R. 13.

3. This Court in *Crawford* acknowledged the rule was procedural. Specifically, the Court stated that the Confrontation Clause's "goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Crawford*, 541 U.S. at 61.

offered as evidence against a defendant are admissible under the Confrontation Clause if the declarant was unavailable and the statements bore adequate "indicia of reliability." Reliability could be inferred either where the evidence fell within a firmly rooted hearsay exception or where it contained particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66-70. *Crawford* expressly overruled *Roberts*, and held that testimonial hearsay statements offered as evidence against a defendant are inadmissible under the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59-60. As this Court explained in *Graham v. Collins*, 506 U.S. 461, 467 (1993), "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision."

The third step in a court's *Teague* analysis is to determine whether either of the two exceptions to non-retroactivity applies. *Caspari*, 510 U.S. at 390.

> The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a "substantive categorical guarantee accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense."

Saffle v. Parks, 494 U.S. 484, 494 (1990) (citations omitted). "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 495.

Crawford did not place any primary conduct beyond prohibition and did not prohibit any category of punishment currently in use for specific offenses. Accordingly, the first exception is inapplicable.

Nor does the rule in *Crawford* set forth a watershed rule of criminal procedure. To qualify for this exception, a new rule

must meet two conditions. It must not only "improve [the] accuracy" of a proceeding, but must also alter "our understanding of the '*bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 241-42 (citations and additional quotation marks omitted).

This Court has noted that "the precise contours of this exception may be difficult to define." *See Butler*, 494 U.S. at 416. But "whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478. "As the plurality cautioned in *Teague*, '[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Id.* at 477 (quoting *Teague*, 489 U.S. at 313).

To underscore the rarity of "watershed" rules, this Court has repeatedly invoked the sweeping rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent defendants have the right to court-appointed counsel in all criminal prosecutions), as a quintessential watershed rule. And since the *Teague* decision in 1989, this Court has yet to hold that *any* rule falls within the "watershed rules of criminal procedure" exception. *See United States v. Mandanici*, 205 F.3d 519, 529 (2d Cir. 2000) (noting that, since *Teague*, "the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule at issue retroactively"). That *Crawford* is not a watershed rule is supported by *Schriro v. Summerlin*, 542 U.S. 348, 356-57 (2004), which noted this Court's refusal to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968), the case that applied the Sixth Amendment's jury-trial guarantee to the States. If the right to a jury trial is not a watershed rule of criminal law, then neither is the admissibility of evidence rule of *Crawford*.

Rather, *Crawford* simply redefined the limits the Confrontation Clause places on hearsay evidence. The decision does not define new rights or constitutional guarantees. It merely defines the test to be used in determining admissibility of a hearsay statement. This is hardly a bedrock determination of basic due process. The basic process due is the clause itself, not the formulation of a new test to determine admissibility under the clause. Indeed, *Crawford* itself left open the question of what is "testimonial," thereby suggesting that it was not a "bedrock" principle.

Furthermore, this Court noted in *Tyler v. Cain*, 533 U.S. 656, 666 (2002), that not even all rules that result in "structural error" when violated fit into *Teague*'s second exception. This implies that *Teague*'s second exception is even narrower than the category of structural-error rules. *See also United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001) (finding that a determination of *structural error* "would seem to be a necessary predicate for a new rule to apply retroactively under *Teague*").

Moreover, every other federal circuit court that has considered the rule has held that *Crawford* is not a watershed rule of criminal law and thus does not apply to cases final at the time of the decision. *See Bintz*, 403 F.3d at 867; *Dorchy*, 398 F.3d at 788; *Mungo*, 393 F.3d at 334-336; *Brown*, 381 F.3d at 1227; *Evans*, 371 F.3d at 444.

The lone deviation is the Ninth Circuit's *Bockting* case, upon which the instant decision relies. Because *Crawford* is not a watershed rule akin to the right to counsel and is not made retroactive by *Teague*, the Ninth Circuit wrongly found the opinion of the California Court of Appeal in this case to be "contrary to" established Supreme Court precedent. In other words, under *Summerlin* and *Teague*, a state prisoner whose conviction is final is not entitled to the benefits of the new rule announced in *Crawford*.

D. THE NINTH CIRCUIT'S HOLDING THAT 28 U.S.C. § 2254(D)(1) INCORPORATES THE *TEAGUE V. LANE* EXCEPTIONS IS CLEARLY ERRONEOUS AND CONFLICTS WITH RULINGS FROM OTHER CIRCUITS

Even if *Crawford* were retroactive under *Teague*, it could not be enforced in this case because is was not "clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d)(1) when the state court rendered its decision. The Ninth Circuit in *Bockting* held:

> The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context.

Bockting, 399 F.3d at 1021 (citations omitted).

Relying on its *Bockting* decision, the Ninth Circuit held in this case that a petition also should issue on the ground that the AEDPA incorporated the *Teague* exceptions. The Ninth Circuit's ruling is clearly erroneous, and further conflicts with the two other circuits that have addressed this issue. The Seventh Circuit and the Fourth Circuit have previously held that the *Teague* exceptions could not be read into the statute:

> The question, rather, is whether an error occurred in the first place, and § 2254(d)(1) means that only rules articulated by the Supreme Court of the United States *before* the state court rendered its decision may be applied on collateral review. Section 2254(d)(1) differs from *Teague* because the new statute closes the escape hatches in *Teague* . . . .

Gosier v. Welborn, 175 F.3d 504, 510 (7th Cir. 1999); *accord*, *Bintz*, 403 F.3d at 868; *Murillo*, 402 F.3d at 789. Likewise, the Fourth Circuit has held that section 2254(d)(1) imports an anti-retroactivity principle into federal habeas law that resembles, but does not codify, the retroactivity doctrine of *Teague*. *Ramdass v. Angelone*, 187 F.3d 396, 406-07 (4th Cir. 1999), *aff'd*, 530 U.S. 156 (2000) (also noting "the standard of § 2254(d)(1) is 'even more stringent' than *Teague*").

In addition to creating a split among the circuits on this issue, the Ninth Circuit also misinterpreted the clear language of 28 U.S.C. § 2254. When a state court adjudicates a claim on the merits, the AEDPA bars federal habeas corpus relief on that claim unless the state-court adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1); *Price v. Vincent*, 538 U.S. 634, 638-39 (2003). A state court's decision is contrary to "clearly established Federal law" "'if the state court applies a rule that contradicts the governing law set forth in our cases,' or 'if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.'" *Early v. Cone*, 535 U.S. 685, 694 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).

Nothing in the language of the AEDPA, or in this Court's decisions on the meaning of "clearly established Federal law," supports the Ninth Circuit's holding that AEDPA adopts *Teague*'s exceptions. To the contrary, as this Court explained, "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002). And, as more recently stated, under the AEDPA, "clearly established federal law" is the "governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (italics added); *see also Williams*, 529

U.S. at 412. The plain language of the statute and this Court's *Andrade* decision are dispositive.

Because this Court has defined the phrase "clearly established Federal law" to mean decisions of this Court "at the time the state court renders its decision" (*Andrade*, 538 U.S. at 71), the Ninth Circuit erred in finding that the *Teague* retroactivity exceptions were incorporated into the AEDPA. Moreover, given the conflict among the circuits created by the Ninth Circuit's unique interpretation of the AEDPA and *Teague*, this Court should grant certiorari to provide uniformity of law regarding this important issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 16, 2005

Respectfully submitted,

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APPENDIX A

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER ZAMORA, Petitioner-Appellee, v. DARREL G ADAMS, Warden, Respondent-Appellant.	No. 03-57074 D.C. No. CV-02-03002-CAS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted January 14, 2005
Pasadena, California

Submission withdrawn January 20, 2005
Resubmitted September 14, 2005

Before: O'SCANNLAIN and CLIFTON, Circuit Judges, and WEINER, ** Senior Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Javier Zamora was convicted in California Superior Court along with three others of the attempted murder of Hugo Cruz, and related offenses, for which he received a sentence of 29 years. At the trial, Cruz refused to testify because of the possibility of his testimony being used against him in a related gun possession case. The Superior Court ruled that three statements that Cruz previously had made to the police–at the scene of the crime, in the hospital two days later, and during questioning about his own case–were admissible as statements of an unavailable witness pursuant to Cal. Evid. Code § 1370.

On direct appeal, all counts were affirmed by the California Court of Appeal and a petition for review was denied by the California Supreme Court. Zamora petitioned for a writ of habeas corpus in federal district court, claiming, among other things, that his Sixth Amendment right to confront Cruz had been violated and that he had been denied the effective assistance of counsel because his attorney had failed to object to Cruz's testimony on Confrontation Clause grounds. The magistrate judge assigned to Zamora's case recommended that his petition be granted because the admission of Cruz's second and third statements[1] violated the Confrontation Clause and because Zamora's lawyer should have objected to their admission at trial. The district court adopted the magistrate judge's report and recommendation and ordered a new trial. The State filed a timely notice of appeal and a motion to stay the decision pending appeal, which was granted.

I.

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1. The first statement, made at the scene of the crime, was properly admitted under the "excited utterance" exception to the hearsay rule.

Our recent decision in *Bockting v. Bayer*, No. 02-15866, 2005 U.S. App. LEXIS 9973 (9th Cir. June 1, 2005), held that the Confrontation Clause rule announced by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), applies retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). *See Bockting*, 2005 U.S. App. LEXIS 9973, at *4. It also held that the *Teague* exceptions were incorporated into the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See id.* at **29-30. Accordingly, the decision of the California Court of Appeal, which affirmed Zamora's conviction even though he did not have an adequate opportunity to cross-examine Cruz, was "contrary to" established Supreme Court precedent in *Crawford*, as made retroactive under *Teague*. *See id.* at 31

II

Without Cruz's subsequent identification of Zamora from photographs, and without his further testimony about the circumstances of his beating and shooting contained in his improperly admitted statements, the only evidence connecting Zamora to the crime scene would have been the internally contradictory testimony of Gilberto Rodriguez,[2/] a friend of Cruz and fellow gang member, and Cruz's equivocal statement at the scene of the crime.[3/] On the other side of the factfinding

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2. Rodriguez initially said that he did not see Zamora strike Cruz, but later testified that he did. Asked to explain this change in his testimony, his response was simply "I don't know."

3. In this statement, Cruz identified his assailants by gang monikers, one of which was recorded by the police as "Chayo." The State asserts that this is a mistranscription of "Child," which was one of Zamora's gang names. This is a plausible argument, but one which the jury did not need to consider given the fact that Cruz later identified Zamora by

ledger, Zamora presented an alibi defense, which included testimony from his uncle that he was in Mexico around the date of the assault. During the course of the jury's six day deliberation, the jurors submitted a request for a readback of Cruz's uncle's testimony.

Considering the weakness of the State's case without the victim's inadmissible statements, we conclude that the Confrontation Clause error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1995).

III

The district court's grant of Zamora's petition for a writ of habeas corpus on the ground that his right of confrontation under the Sixth Amendment was violated by the admission of Cruz's second and third out-of court statements is

AFFIRMED.

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photograph. Without that identification, however, the case against Zamora would have been much less convincing and the jury would have had to consider seriously the question of whether Zamora was "Chayo."

APPENDIX B

LODGED
CLERK, U.S. DISTRICT COURT
OCT -1 2003
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATE DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JAVIER ZAMORA	)
	) **CV NO. 02-3002-CAS(AJW)**
Petitioner,	)
	)
v.	) **JUDGMENT**
	)
DERRAL G. ADAMS, Warden,	)
	)
Respondent.	)
	)

It is hereby adjudged that the petition for a writ of habeas corpus is granted as to petitioner's claims that he was denied his right of confrontation and his right to the effective assistance of counsel, and denied as to petitioner's remaining claims. Respondent shall release petitioner from custody unless the State of California provides petitioner with a new trial within one hundred and twenty (120) days of the date of entry of judgment.

Dated: _____

_____
Christina A. Snyder
United States District Judge

APPENDIX C

FILED
CLERK, U.S. DISTRICT COURT
OCT -1 2003
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JAVIER ZAMORA	)
	) **CV NO. 02-3002-CAS(AJW)**
Petitioner,	)
	)
v.	) **REPORT AND**
	) **RECOMMENDATION OF**
DERRAL G. ADAMS,	) **MAGISTRATE JUDGE**
Warden,	)
	)
Respondent.	)
	)

Background

Petitioner and his co-defendant, Roberto Gallardo ("Gallardo"), were charged with attempted murder, assault with a firearm, attempted robbery, and assault by means likely to produce great bodily injury.

As discussed in detail below, the victim, Hugo Cruz ("Cruz"), did not testify at trial. Instead, his statements to police about the shooting were admitted through the testimony of police officers and by playing a videotape of his interview by police.

Cruz was a member of the Avenues gang, and had been convicted numerous times for selling drugs. [Reporter's Transcript on Appeal ("RT") 1030, 1257, 1587-1588]. At the

time of trial, Cruz was facing charges of being a felon in possession of a firearm.

Officer Duarte testified that he responded to a radio call about a shooting and arrived on the scene at around 10:15 p.m. on October 6, 1999. Blood was splattered on the driveway and steps leading to Apartment 3. [RT 978-980]. Officer Duarte began pounding on the door to the apartment. He looked through a window and saw a man standing behind the door, bleeding profusely. Officer Duarte shouted to the man, directing him to open the door, but the man would not open the door. Officer Duarte and his partner were unable to kick the door in. After the fire department arrived, a fire axe was used to open the door. [RT 944, 980-981].

Sergeant Stephen Cunningham testified that he arrived at Cruz's apartment at 10:30 p.m on October 6, 1999. Several other officers already were standing outside of Cruz's apartment. Cruz had locked the door and would not let the police officers in. The officers forced the door open and found Cruz covered in blood. The apartment appeared to have been ransacked. Sergeant Cunningham asked Cruz whether he knew who had "done this" to him. Cruz responded "I don't know why Sparky did this."[1/] [RT 940-952, 959-961, 968-973].

A baggie containing a small amount of white powder was found in Cruz's apartment. Although the powder "had the appearance [of] and could have been narcotics," it was not analyzed. [RT 1250-1254].

Officer Perez interviewed Cruz on the front steps of his apartment. Cruz was reluctant to talk to the police and was vague about the incident. [RT 950-954, 997-1000]. Cruz said that he was sitting in his living room with the door open when four of his friends from the Avenues gang came to his

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1. Sparky is the gang moniker of Harold Riley, another member of the Avenues gang. [RT 954, 2709].

apartment and demanded money.[2] He identified three of the men by the nicknames "Sparky," "Chayo,"[3] and "Little Speedo's brother,"[4] ("Little Speedo's brother") but was unable to name the fourth assailant. When Cruz told the four men that he had no money, Sparky and Chayo produced handguns and threatened him. Cruz told the officers that when he again refused to give them money, Sparky and Chayo shot him. [RT 983-984, 998-1002, 1010-1015].

According to Officer Perez, Cruz initially refused medical treatment, but eventually consented to be taken to the hospital. [RT 965, 987, 1000-1003]. He was admitted to the hospital on October 7 and released the following day. [RT 933, 936]. Cruz suffered two scalp wounds and two wounds on the right upper thigh, but no severe damage. [RT 935-939].

Officer Rodriguez testified that he interviewed Cruz in the hospital on October 8, 1999. [RT 1579-1584]. Cruz told Officer Rodriguez that he had been jumped by four Avenues gang members. Cruz identified the four assailants, including petitioner, from photographs in the Avenues gang mug book.

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2. Cruz's statements to Officer Perez were admitted as spontaneous statements pursuant to California Evidence Code section 1240. [See RT 901-907].

3. Petitioner was identified as "Popeye" on his police identification cards, and officers had called him that name on the street. Gilberto Rodriguez also had heard that name used to identify petitioner. [RT 1221, 1226, 1516-1517, 1537, 1540-1542, 1835]. Both Cruz and Rodriguez identified petitioner as "Child." [RT 1030, 1226-1228; CT 179-189, 202-203].

There was no evidence that petitioner was known as "Chayo." One of the Spanish-speaking officers testified that he would have spelled the name "Challo," which he believed was a shortened version of "Rosario." [RT 1016-1019].

4. "Little Speedo's brother" referred to Marvin Ponce. [RT 1596].

Cruz gave Officer Rodriguez the monikers for Riley and Ponce, but he could not remember defendant Gallardo's name. He identified the photograph of petitioner by the moniker "Child." Although Cruz made positive identifications, he refused to sign his name on the photographs he had identified, and did not circle the photograph identifying petitioner. [RT 1579-1586, 1811].[5]

On October 30, 1999 (more than three weeks after the shooting), Cruz was arrested for being a felon in possession of a firearm. The police subsequently interviewed Cruz at the police station, and the interview was videotaped. [RT 1587-1589].[6] In that interview, Cruz told the police that as he was leaving his apartment on October 6, 1999, Riley and Ponce arrived and demanded money. Cruz told them he had no money to give them. Petitioner and Gallardo arrived, and all four started hitting Cruz. The men tried to put Cruz in the trunk of their car, but he resisted. All four men dragged Cruz to his apartment, where Riley and Ponce pulled out guns. Riley said he was going to kill Cruz. Ponce shot Cruz in the head, and Riley shot Cruz in the leg. They continued to fight with Cruz, insisting that they wanted money. They kept looking for money and stole Cruz's wallet containing $80, rings, a gold chain, and a CD player. [Clerk's Transcript ("CT") 183-246]. Cruz identified photographs of petitioner, Riley, Ponce, and Gallardo as his assailants. [CT 197-199]. He believed that the gang still wanted to kill him. Cruz denied telling the police who had attacked him on the night of the crime. [CT 215-216]. He also denied that the gang was trying to collect money from him for selling drugs. [CT 234-235; RT 1596-1598].

At the conclusion of the interview, the following colloquy

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5. Detective Rodriguez testified that gang members generally do not want to be identified as giving information to the police about other gang members. [RT 1586].

6. The videotape was played for the jury. [RT 1594].

took place between Officer Rodriguez (indicated by "D1") and Cruz (indicated by "C"):

D1: For whatever - whatever - call me while your inside and I'll see if I can help you. I don't' want them to kill you also inside, you know they are uh - uh they have everything controlled in there right now. There are many Avenues in there - so. Do you have any question or anything?

C: Well, do you think I can get out?

D1: Let me speak with the District Attorney - I - I can't ask you anything but - how should I say it is understandable that all of that happened. I mean - they wanted to kill you - - what more - and -

C: Yes, well - you know that is why.

D1: Um -

C: Because if - because if you guys want me to help you out and that and -

D1: Oh, that is the thing -

C: - that is why -

D1: and your going to -

C: * * * (unintelligible) at court.

D1: - your going to - your going to court.

C: * * * the impression that - to get out - do you understand me.

D1: Okay.

C: Because I would be -

D1: But, you know what - if that happens - you're not going to - we'll put you in a - in a- another apartment or something.

C: Yes, yeah.

D1 - cause there - you know - you can go to one side.

C: Yes.

D1: Okay, well let me talk to them and let's see if - if -

C: * * * that is why I want that - understand me.

D1 - and he also - okay.

C: - that is why I'm helping you out.

[CT 241-242].

The only other witness to any of the events on the night of the shooting was Gilberto Rodriguez ("Rodriguez"). Rodriguez's version of events was not entirely consistent with Cruz's out of court statements. Rodriguez, who also belonged to the Avenues gang, testified that he knew Cruz and his assailants (including petitioner). According to Rodriguez, he was outside of Cruz's apartment on October 6, 1999. After speaking to Cruz for about 10 to 15 minutes, Rodriguez went back into the apartment building. [RT 1022-1034, 1210-1225]. From one of the apartments, Rodriguez saw petitioner, Gallardo, Riley, and Ponce walk up to Cruz, surround him, and beat him. Petitioner got the keys to Cruz's apartment and ran to open the door. [RT 1027-1026, 1210-1212]. Petitioner, Riley and Ponce dragged Cruz to Cruz's apartment and closed the door. Gallardo remained outside. [RT 1034-1036]. Rodriguez then heard two loud "blows, like gunfire." [RT 1035]. The men left 10-15 minutes later. [RT 1034-1035]. The next day, Rodriguez told the police what he had observed. He identified petitioner and Gallardo from photographs in a gang photo book. Rodriguez was worried that the gang wold retaliate against him and his family because he had identified the gang members who attacked Cruz. [RT 1039-1044, 1049-1050, 1211-1228].

Testifying as an expert, Officer Rodriguez opined that the four Avenues gang members were seeking "rent" from Cruz for selling drugs in their territory.[7] When Cruz refused, the four gang members "sent a message that if you don't pay, you're going to be disciplined, and they'll do it by beating you up, assaulting you and even killing you." [RT 1805]. According to Officer Rodriguez, the beating and shooting were intended to benefit the street gang. [RT 1805-1807].

Petitioner presented an alibi defense that he was in Mexico

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7. Cruz, however, denied that his assailants came to collect "rent." [CT 219-220].

when the crime occurred. Petitioner had been deported in February, 1999. [RT 1829]. According to Guadalupe Hernandez, a distant relative, petitioner lived with her continuously since that time. Hernandez testified that petitioner had stayed with her in a rental house in Mexico and helped her build her new house. Hernandez said that she believed that petitioner was with her until at least October 12, 1999 (six days after the crime). She remembered the date because she was supposed to be out of her old house on October 8, but it had taken her about four more days to move her things into her new house. She recalled petitioner helping her move furniture. [RT 1829, 2190-2197, 2432-2444].

Petitioner's uncle, Rafael De La Paz Hernandez testified that he visited petitioner in Mexico and had seen him there on October 7, 1999, and a week before that as well. [RT 1901-1908].

Petitioner also presented the testimony of Daniel Santamaria, a retired Los Angeles police officer then working as a private investigator. Santamaria testified that he interviewed Cruz in jail on February 7, 2000. [RT 2103-2104]. Santamaria read the police report to Cruz, including the part that listed the suspects as Avenues gang members. Cruz responded "that's not what happened." Cruz denied that the persons who attacked him were Avenues gang members and was "very adamant" that none of the people listed on the police report were involved in his attack. [RT 2102-2106]. Instead, he indicated that the attackers were about Santamaria's age (i.e., 52). [RT 2110]. Santamaria returned to visit Cruz three times after February 7, 2000, in an effort to get Cruz to sign the written report reflecting his statements. Cruz refused to sign the report. [RT 2107]. He indicated to Santamaria that he "would rather go to court and in front of the defendants say in an open court that he did not accuse them of the attack." [RT 2111]. Cruz was uncooperative, failed to answer Santamaria's questions, and focused on his own case. Based on this, Santamaria concluded that Cruz did not want to cooperate with

the defense because he was interested in making a deal on his own case. [RT 2113-2117].

In rebuttal, Officer Rodriguez testified that he visited Cruz on May 4, 2000. Cruz told Officer Rodriguez that he had made no statements to a defense investigator and that he did not want to talk to the investigator. [RT 2449-2450].

The jury convicted petitioner and Gallardo of all charges. [CT 341-346]. In addition, the jury found true the allegations that the offenses were committed for the benefit of a street gang and that a principal intentionally discharged a firearm during the attempted murder and attempted robbery. Petitioner was sentenced to state prison for a term of 29 years. [CT 356-360].

Petitioner appealed to the California Court of Appeal, which affirmed the judgment, but struck a one year enhancement. [Answer, Exs. C & D]. On January 3, 2002, the California Supreme Court denied petitioner's petition for review. [Answer, Exs. E & F].

Petitioner's contentions

In his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, petitioner alleges the following grounds for relief:

1. Petitioner was denied due process because the trial court erroneously imposed a 20 year sentence enhancement, misapplying section 12022.53 of the California Penal Code. [Petition at 5].

2. Petitioner was denied his right to confront and cross-examine witnesses against him because the trial court admitted two out of court statements made by the victim, Hugo Cruz. [Petition at 6].

3. Evidence Code section 1370 is unconstitutional on its face because it denies criminal defendants the right to confront and cross-examine prosecution witnesses. [Petition at 6].

4. Petitioner received ineffective assistance of counsel because his attorney failed to raise "constitutional confrontation

objections" to the hearsay statements admitted pursuant to section 1370 of the California Evidence Code. [Petition at 6].

5. Petitioner was denied due process because the evidence was insufficient to prove that he intended to kill the victim. [Petition at 6a].

Standard of review

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Rios v. Rocha, 299 F.3d 1234, 1236 (9th Cir. 2002). Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

As the Supreme Court has explained, a state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from our precedent." Williams v. Taylor, 529 U.S. 362, 405-406 (2000); see also Price v. Vincent, ___ U.S. ___, 123 S.Ct. 1848, 1852-1853 (2003); Lockyer v. Andrade, ___ U.S. ___, 123 S.Ct. 1166, 1173 (2003); Early v. Packer, 537 U.S. 3, 7-8 (2002) (per curiam).

A state court decision is an unreasonable application of Supreme Court precedent if the state court identified the correct legal principles, but applied those principles to the facts of the case in a way that was not only incorrect or clearly erroneous, but "objectively unreasonable." Andrade, 123 S.Ct. at 1174-

1175; Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002) (per curiam); Bell v. Cone, 535 U.S. 685, 699 (2002); Williams, 529 U.S. at 411.

While Supreme Court precedent is the only authority that is controlling under the AEDPA, this Court may look to Ninth Circuit case law as persuasive authority "for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law." Vlasak v. Superior Court of California ex rel. County of Los Angeles, 329 F.3d. 683, 687 (9th Cir. (2003) (quoting Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002) (internal quotation marks and citation omitted), amended by 311 F.3d 928 (9th Cir. 2002)).

Finally, the AEDPA provides that state court findings of fact are presumed to be correct unless petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Discussion

Confrontation Clause

Petitioner alleges that admission of Cruz's statements to the police made in the hospital on October 8, 1999 (two days after Cruz was shot) and made during a taped interview at the police station on October 30, 1999 (after Cruz was arrested) deprived him of his right of confrontation. Petitioner's claim is based upon the following facts.

On the first day of trial, the trial court indicated its tentative ruling that Cruz's statements to the police at the hospital and later at the police station were admissible under California Evidence Code section 1370.[8/] [RT 901].

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8. California Evidence Code § 1370 provides:

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions

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are met:

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.

(5) The statement was made in writing, was electronically recorded, or made to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

As discussed below, showing trustworthiness by the means allowed in subsection (b)(3) has been expressly disapproved by the Supreme Court. See Idaho v. Wright, 497 U.S. 805, 823

Petitioner's counsel argued that Cruz's statements did not meet the requirements of section 1370. [RT 902-903, 906]. The trial court disagreed, and ruled that the statements were admissible. [RT 906].

On the second day of trial, Cruz was present with Deputy Public Defender Bill Weiss. [RT 1201]. In a hearing outside the presence of the jury, the following occurred:

> THE COURT: . . . The matter is here to determine whether or not this witness, Mr. Cruz, as a potential witness would exercise his right not to be called as a witness, or to testify, or at least not to answer certain questions that might incriminate him, I guess is the way to put it. So go ahead.
> MR. WEISS: Your Honor, Mr. Fisher represents him [Cruz]. Steve Fisher represents him. He is downtown on a pending case, and he asked me to stand in. I talked to Ms. Schwartz [the prosecutor] this morning, and she filled me in on what's going on in this case, and I believe she - she is of the opinion that he would be subject to cross-examination on his case downtown if he were to testify in this matter, and that they are intertwined in a sense. And, therefore, after discussing the matter with Mr. Cruz, it is his desire not [to] testify on the basis of self-incrimination.
> THE COURT: All right. Anything to be said by any lawyer with respect to that representation?
>
> All right. Is there any - I don't think we needed to ask him any questions. I mean, if everybody agrees that he has such a right, we don't have to go through the drill of doing that unless I am told that I'm supposed to, but I don't think we necessarily have to do that.
>
> So unless there is any other comment, then we'll just declare that he is an unavailable witness, legally. And he will not be called as a witness by anybody, but he is subject to impeachment once they put on his prior statement, and we can go through all that later.

(1990).

[RT 1201-1202].

Petitioner's counsel did not object to the finding that Cruz was unavailable to testify. Petitioner's counsel, however, reiterated his argument that Cruz's statements should not be admitted under section 1370 of the California Evidence Code because they did not meet the trustworthiness requirement. In part, petitioner's counsel argued that

> [t]here is a lot of contradictions in what allegedly was said by Mr. Cruz. If the court allows this statement in under 1370, neither Mr. Gershan [counsel for co-defendant Gallardo] nor myself will have an opportunity to cross-examine Mr. Cruz and to ask him about these obvious inconsistencies and contradictions, and to test whether or not he is, in fact telling the truth.
>
> So the fact that 1370 requires that the statement be made under circumstances that would indicate its trustworthiness, I think it fails miserably in that regard, so I would object on behalf of Mr. Zamora.

[RT 1205]. He also argued that Cruz had a bias or motive because he was in custody and was expecting leniency from the police in exchange for his statements. [RT 906-907]. The prosecutor represented that there had been no deal or promise to Cruz with respect to his pending prosecution. [RT 907]. The trial court rejected the defense arguments, and Cruz's statements were admitted.

Petitioner's claim that admission of Cruz's statements deprived him of his right to confront and cross-examine Cruz was rejected by the California Court of Appeal. The court refused to consider petitioner's claim that the trial court should not have found Cruz unavailable to testify within the meaning of the California Evidence Code because it did not require Cruz to take the stand assert his Fifth Amendment privilege. The court found that this particular contention was waived by counsel's failure to object at the time of the trial court's ruling. [Answer, Ex. C at 128-130]. The court also rejected petitioner's claim that admission of the statements violated the

Confrontation Clause, explaining that Cruz's statements contained sufficient indicia of trustworthiness:

> The trial court did not abuse its discretion in concluding the statements of October 8, 1999, and after October 30, 1999, were made under circumstances indicating trustworthiness. The statements were consistent with the statements made on October 6, 1999, which bore indicia of trustworthiness. Because of Cruz's injuries, it is reasonable to infer it was not possible for the police to interview Cruz at the scene concerning all the details of the incident. The later statements were elaborations of the earlier statement. The October 6th statement was made immediately after Cruz had been assaulted, at a time when Cruz was still under the stress of the incident. Cruz was extremely reluctant to talk to the police. The identifications of fellow gang members subjected Cruz to a risk of gang retaliation. There was no evidence Cruz had a motive to fabricate the identifications. These circumstances indicated the reliability of the statements. Cruz did not remember he had spoken to the police on October 6, 1999. The information he gave the police subsequently was consistent with the information he had given on October 6, 1999. These circumstances indicate Cruz did not fabricate his story. He never wavered in his identifications. The photographs he selected on October 8, 1999, and after October 30, 1999, were photographs of the three men he had identified by name on October 6, 1999, and of the fourth man, whose name he had not remembered. Rodriguez, who witnesses the assault, corroborated Cruz's identification of defendants. Rodriguez's identification was made under circumstances indicating trustworthiness, in that as a fellow gang member, he, too, risked retaliation from the gang for identifying gang members, and he knew defendants. Further, the fact Rodriguez did not talk to Cruz at any time after the incident indicates an absence of collusion

> between Rodriguez and Cruz to implicate defendants. The trial court did not abuse its discretion in concluding Cruz's statements were trustworthy.

[Answer, Ex. C at 130-131].

Federal law

Under the Confrontation Clause of the Sixth Amendment, a criminal defendant has the right to "be confronted with the witnesses against him." As the Supreme Court has stated,

> When the government seeks to offer a declarant's out-of-court statements against the accused . . . courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant 'to submit to cross examination, the greatest legal engine ever invented for the discovery of the truth.

Lilly v. Virginia, 527 U.S. 116, 124 (1999) (quoting California v. Green, 399 U.S. 149, 158 (1970)). "[T]he Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." Idaho v. Wright, 497 U.S. 805, 813 (1990). Instead, there is a two-step approach for determining when incriminating out-of-court statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause.

First, the Sixth Amendment establishes a "rule of necessity." Ohio v. Roberts, 448 U.S. 56, 65 (1980). In the usual case, the prosecution may satisfy this prerequisite by demonstrating the unavailability of the declarant whose statement it wishes to use against the defendant. Bains v. Cambra, 204 F.3d 964, 973 (9th Cir. 2000).

Second, once a witness is shown to be unavailable, his or her statement is admissible only if it bears adequate "indicia of reliability." Roberts, 448 U.S. at 66. When hearsay testimony is properly admitted pursuant to a firmly rooted exception, no

further guarantees of trustworthiness are required. Roberts, 448 U.S. at 65. Where the statements do not fall within a firmly-rooted hearsay exception, however, they are admissible only if the prosecution can demonstrate that the statements possess "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66. A determination as to whether a statement has particularized guarantees of trustworthiness must be based on the totality of the circumstances, but the "relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Wright, 497 U.S. at 819. In other words, independent corroborating evidence cannot be used to bolster a statement's trustworthiness. Wright, 497 U.S. at 823. "An 'affirmative reason, arising from the circumstances in which the statement was made,' is necessary to rebut the presumption of unreliability and exclusion under the Confrontation Clause." Webb v. Lewis, 44 F.3d 1387, 1391 (9th Cir. 1994) (quoting Wright, 497 U.S. at 821). In all cases, the particularized guarantees of trustworthiness must be sufficient for the statement to be considered "so trustworthy that adversarial testing would add little to its reliability." Wright, 497 U.S. at 821.

For the following reasons, admission of Cruz's statements violated the Confrontation Clause.[9/]

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9. Although the California Court of Appeal concluded that petitioner had waived some of his claims related to the admission of Cruz's testimony, it did not find that petitioner had waived that Cruz's statements violated the Confrontation Clause because they were untrustworthy. [See Answer, Ex. C at 131 n.6 (finding Cruz's statements trustworthy under the Confrontation Clause]. The precise contours of the state court's waiver analysis, however, are unclear. [See Answer, Ex. C at 131-132 (stating that petitioner waived his claim that Cruz's statements violated the Confrontation Clause because they did not fall within a firmly rooted hearsay exception because his

The state did not demonstrate that Cruz was unavailable

Invocation of the Fifth Amendment privilege against self-incrimination renders a witness "unavailable" within the meaning of section of the California Evidence Code. People v. Duarte, 24 Cal.4th 603, 609 (2000) (explaining that where a witness makes a valid invocation of Fifth Amendment right not to incriminate himself, he is, for hearsay rule purposes, not available as a witness); Luna v. Cambra, 306 F.3d 954, 963 (9th Cir.) ("A witness' proper invocation of the Fifth Amendment privilege against self-incrimination makes him or her

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attorney failed to raise the objection at trial). To the extent that the state court's opinion could be read as relying on an independent and adequate state law procedural default, federal review is not precluded in this case. Respondent has waived the defense of procedural default by failing to raise it in the answer to the petition. See Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003); Franklin v. Johnson, 290 F.3d 1223, 1229 (9th Cir. 2002). Further, nothing about the circumstances of this case warrants exercise of this Court's discretion to raise the issue sua sponte. See generally Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998) (holding that federal court may raise procedural default sua sponte when to do so serves the interests of comity, federalism, and judicial efficiency); see Smith v. Horn, 120 F.3d 400, 408 (3d Cir. 1997) (finding it inappropriate to raise procedural default sua sponte where the record is well developed and the merits strongly support the petitioner's claim), cert. denied, 522 U.S. 1109 (1998). This is especially true because respondent filed a lengthy response in which it did not rely upon the state court's imposition of a procedural bar and because based upon petitioner's claim of ineffective assistance of counsel, it appears that petitioner would be able to demonstrate cause and prejudice excusing any procedural default.

unavailable for purposes of section 1230 [of the California Evidence-Code]."), amended, 311 F.3d 928 (9th Cir. 2002).

The general standard for a valid assertion of the Fifth Amendment privilege is well established. The privilege not only extends "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." Ohio v. Reiner, 532 U.S. 17, 20-21 (2001) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)). The Supreme Court has held that the privilege's protection extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer." Hoffman, 341 U.S. at 486. Further, "[t]hat inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination." Reiner, 532 U.S. at 21 (quoting Hoffman, 341 U.S. at 486). Finally, a danger of "imaginary and unsubstantial character" will not suffice. Mason v. United States, 244 U.S. 362, 366 (1917).

Further, when balancing the Sixth Amendment right of the accused and the Fifth Amendment right of the witness, "the trial judge must make an appropriate inquiry into the basis of the privilege claimed by the witness, and may not permit the witness to refuse to testify" where the witness has no good-faith basis for invoking the privilege or where a narrower privilege would adequately protect the witness. United States v. Thornton, 733 F.2d 121, 125 (D.C. Cir. 1984) (citation omitted); see also Hoffman, 341 U.S. at 486 ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself - his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."). The court's duty to scrutinize a witness's invocation of the Fifth Amendment is particularly weighty where, as here, the witness makes a blanket assertion of the privilege. See United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980).

The trial court found Cruz unavailable based upon his attorney's statement that Cruz intended to invoke his Fifth

Amendment privilege against self-incrimination. Cruz's attorney's statement, in turn, was based upon the prosecutor's opinion that if Cruz testified at petitioner's trial, he would be subject to cross-examination at his own trial for gun possession. Cruz was never called to the stand or asked any questions. Contrary to the prosecutor's opinion, the record contains no explanation as to how Cruz's testimony about who shot him on October 6, 1999 would posses probative value in a prosecution for gun possession on October 30, 1999.

Furthermore, the potential for any self-incrimination seems even less plausible in light of the fact that Cruz already had admitted to possessing the gun. That is, in Cruz's videotaped statement to police, Cruz admitted to the police that he possessed the gun before he was arrested. Cruz's admission was made after he had received and waived his Miranda rights. Cruz explained that he got the gun because gang members had visited him and he was scared and felt that he needed protection. [CT 225-231].

Therefore, at least with respect to Cruz's outstanding prosecution for gun possession, no real danger of further incrimination existed if he were called to testify as a witness to his assault and shooting.

Finally, nothing else in the record suggests that Cruz's testimony would tend to incriminate him. For example, the mere fact that Cruz was a percipient witness and victim of a crime is not particularly self-incriminatory. The state court's acceptance of Cruz's blanket assertion of the Fifth Amendment renders review of Cruz's claim impossible. This Court "cannot speculate and say that any response to all possible questions would or would not tend to incriminate the witness." United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978) (quoting United States v. Malnik, 489 F.2d 682, 686 (5th Cir.), cert. denied, 419 U.S. 826 (1974)).

Accordingly, the state did not meet its burden of demonstrating that Cruz was unavailable to testify about the events surrounding the shooting. The trial court erred in

accepting a blanket refusal to testify based upon representations of counsel which were, in turn, based upon the unexplained and apparently inexplicable legal opinion of the arguably less than disinterested prosecutor in petitioner's case.

Even if Cruz was unavailable, however, his statements lacked sufficient indicia of reliability to be admissible under the Confrontation Clause.

Indicia of reliability

As the California Court of Appeal has recognized, section 1370 of the California Evidence Code, which was enacted in 1996, is not a "firmly rooted" hearsay exception for Confrontation Clause purposes. People v. Kons, 108 Cal.App.4th 514, 523 (2003). Thus, the Confrontation Clause requires that the statements bear "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66.

The California Court of Appeal concluded that Cruz's statements were trustworthy because (a) they were corroborated by Cruz's own earlier statement (which was admitted as a spontaneous declaration), (b) Cruz was "extremely reluctant to talk to the police," (c) the identification of fellow gang members subjected Cruz to a risk of gang retaliation, (d) there was no evidence that Cruz had a motive to fabricate the identifications, (e) Cruz never wavered in his identifications, and (f) Cruz's statements were corroborated by Rodriguez's testimony. [Answer, Ex. C at 130-131].

First of all, the state court contradicted clearly established federal law by considering independent corroborating evidence (that is Rodriguez's testimony) to bolster the trustworthiness of Cruz's statements. See Wright, 492 U.S. at 819 &-823 (explaining that the reliability of the out-of-court statements cannot be established "by bootstrapping on the trustworthiness of other evidence."); Fern v. Hornung, ___ F.3d ___ 2003 WL 22072155 (9th Cir. 2003) (noting that "*Lilly* explicitly rejected the argument that the trustworthiness of a statement for

purposes fo the Confrontation Clause could be judged in relation to other corroborating evidence; finding it 'irrelevant' that other evidence at trial corroborated the declaration.") (citing Lilly, 527 U.S. at 137-138).[10]

Second, the state court's assertion that Cruz never wavered in his identification of petitioner is contradicted by the record. Not only did Cruz waver in his identification, he completely recanted it when he was interviewed by Mr. Santamaria. In addition, his statements were not entirely consistent with each other and with his original statement made on the night of the shooting. For example, at the hospital, Cruz did not tell Officer Rodriguez that the perpetrators attempted to put him in a car. This fact was mentioned for the first time during the interview with police on October 30, 1999. Also, on the night of the shooting, Cruz told Officer Perez that four of his friends had walked in while Cruz was sitting in his apartment with the door open. Later, he indicated that two of the men approached him as he was leaving his apartment, then the two other men joined them. In addition, at the scene, the name Cruz reportedly gave the officers was "Chayo," but later identified the assailant as "Child."

Third, the state court's reliance on the absence of evidence that Cruz had a motive to fabricate his identification also is not consistent with Supreme Court precedent. The absence of

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10. Moreover, the state court was not entirely correct about Rodriguez's testimony. In fact, Cruz's statements were not consistent with Rodriguez's testimony in significant respects. For example, Cruz stated that the four men tried to put him in a car and that all four men came into his apartment. Rodriguez, who claimed to have witnessed the entire incident, did not mention the four men trying to put Cruz in a car, and testified that Gallardo remained outside and did not enter the apartment. In addition, Cruz indicated that the men approached him in his apartment, whereas Rodriguez testified that the men approached Cruz on the sidewalk.

evidence in the record to establish a bias or motive by Cruz against petitioner is not a sufficient indicia of trustworthiness. As the Supreme Court has explained, hearsay statements are inherently unreliable unless that presumption is rebutted by circumstances demonstrating reliability. Roberts, 448 U.S. at 66. Thus, the Supreme Court presumes the witness is biased or unreliable unless there is affirmative evidence to the contrary.

Moreover, the record actually supports a finding that Cruz was biased or unreliable for several reasons. Even when police questioned him on the night of the shooting, Cruz was uncooperative. This suggests that he might not want to reveal the truth for a variety of reasons.

Likewise, nothing about the circumstances establishes that Cruz was particularly likely to be telling the truth when he made his statements to the police. The statements were not made contemporaneously with the events they were describing. The hearsay exception for spontaneous declarations is based upon the precept that he trauma of the infliction or threat of infliction of injury enhances the reliability of statements made at or near the time of the trauma by reducing the time and ability of the declarant to fabricate his story or for others to coach the declarant. Cruz's statements were made two and 24 days after the shooting. Thus, Cruz had ample opportunity to collect himself, consider his statements and identification, and fabricate a story if he was so inclined.[11/]

Cruz's statements were not made to someone to whom he was likely to speak truthfully. The fact that Cruz made his statements to the police does not establish his credibility. As the California Court of Appeal has explained:

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11. Under both California and federal law, spontaneous declarations must be made while the declarant is "under the stress of excitement caused by" the exciting event. Cal. Evid. Code § 1240; Fed. R. Evid. 803(2). In Cruz's only arguably spontaneous statements, made at the scene, he apparently did not identify petitioner.

> While it is true that filing a false police report may subject one to criminal sanction, that alone does not establish the statement is trustworthy. Many people lie to the police. There is no showing in this record that, due to his background or culture, [the declarant] was unlikely to be one of those people.

Kons, 133 Cal .Rptr.2d at 527 (citation omitted). Nothing about Cruz suggests that he was unlikely to lie to the police. Rather, the circumstances make it likely that Cruz would lie. Cruz was a gang member who may have been involved in criminal activities. In fact, a baggie containing white powder that "appeared to be narcotics" was found in Cruz's apartment on the night he was shot, and Cruz locked the door and refused to open it for the police despite his injuries. These facts suggest that Cruz might have had something to hide from the police and could be motivated to lie in order to deflect attention from himself. In addition, Cruz was actually under arrest at the time of his videotaped interview. Cruz's comments made during the taped interview suggest that he was helping the police in the hope of receiving some kind of benefit - both protection in jail and possibly release from custody. See Forn, 2003 WL 22072155 at *8 (finding no indicia of reliability where declarant's statement was made in custody, was not truly against his interest, and was made with an apparent motive to fabricate or exaggerate).

Consideration of other hearsay exceptions in confirms the absence of other indicia of reliability. Cruz's statements were not self- inculpatory and did not include admissions contrary to Cruz's penal interests. See Williamson v. United States, 512 U.S. 594, 605 (1994). Instead, at least with respect to the statements Cruz made after he was arrested, his statements were offered in an effort to excuse or explain his gun possession. As Officer Rodriguez commented during the interview, Cruz's gun possession was "understandable" because "they wanted to kill you." [CT 242].

Adding to the lack of reliability of Cruz's statements is that

they were not taken under oath or subject to cross-examination. See Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986); LaJoie v. Thomson, 217 F.3d 663, 668 (9th Cir. 2000). In addition, while arguably voluntary, the statements were made in response to police questioning (which was at times leading), and were not spontaneous.

While it is true that Cruz's identification of gang members may have subjected him to gang retaliation, this alone is insufficient to demonstrate that his statements were trustworthy.

As mentioned, Supreme Court precedent requires that the prosecution show the statements be "so trustworthy that adversarial testing would add little to [their] value." Wright, 497 U.S. at 821. Considering all of the circumstances, it is not reasonable to conclude that cross-examination of Cruz would be of marginal utility. To the contrary, there would be great utility in testing Cruz's version of events by cross-examination.

Thus, the admission of Cruz's statements violated petitioner's right to confront and cross-examine witnesses against him and the state court's conclusion that the statements were sufficiently reliable under the Confrontation Clause is an unreasonable application of federal law. See Wright, 497 U.S. at 819-823.

The error was not harmless

Confrontation Clause violations are subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 306-307 (1991) (holding that erroneous admission of a non-testifying accomplice's out of court statement is a trial-type error subject to harmless error analysis); Olden v. Kentucky, 488 U.S. 227, 232 (1988) (per curiam) (stating that violations of the Confrontation Clause are subject to harmless error); Van Arsdall, 475 U.S. at 684 (same). Thus, petitioner is entitled to federal habeas relief only if the error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Forn, 2003

WL 22072155 at *9. In determining whether the error was harmless, the following factors are relevant: the importance of the testimony; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness; the extent of cross-examination otherwise permitted; and the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684; Whelchel v. Washington, 232 F.3d 1197, 1203-1206 (9th Cir. 2000).

To begin with, the prosecution's case was not overwhelming. Much of the evidence presented constituted general evidence about how gangs operate. Without the improper admission of Cruz's hearsay statements delivered to the jury through police officers and by playing the videotaped interview, the jury was left with (a) Cruz's original statement made on the night of the shooting and (b) Rodriguez's testimony - neither of which was strong evidence that petitioner was one of the perpetrators.

In his original statement, Cruz identified his assailants by gang monikers, none of which was ever directly connected to petitioner.[12/] It was only at the hospital and police station that

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12. In a supplemental brief filed on September 23, 2003, respondent points out that the distinction between "Chayo" and "Child" was "blurred" and "unclear" from the record. [Supp. Brief at 4-5 (citing RT 1515-1519 (counsel refers to "Chayo" and "Child" interchangeably); RT 984, 994, 1018-1019 (Officer Perez believed that the spelling was "Challo," and testimony that the officer who spoke with Cruz on the night of the shooting did not speak Spanish]. Respondent also argues that "Chayo" and "Child" "are near homonyms." Finally, respondent argues that at the time of the interview in which Cruz identified "Chayo," Cruz had just been beaten and shot in the head and may not have been speaking clearly. [Supp. Brief at 51]. Based upon these contentions, respondent argues that the two words represented a single moniker which referred to petitioner. First of all, "Chayo" and

Cruz identified petitioner from gang photo books. Without these hearsay statements, the jury would have been presented with no evidence that Cruz ever identified petitioner as one of the perpetrators.

Thus, the only positive non-hearsay identification of petitioner came from Rodriguez, who was not a very compelling witness. Rodriguez, who admitted that Cruz was his friend, had testified at the preliminary hearing that he did not see petitioner beat Cruz, but later contradicted himself at petitioner's trial. [CT 17-20; RT 1057-1063]. Rodriguez also admitted that he was not telling the truth when he said that he saw petitioner hit Cruz. [RT 1059]. Rodriguez's explanation for his change in testimony was "I don't know." [RT 1059-1060]. In addition, Rodriguez did not tell the police what he had seen until he was picked up and cited for truancy. [See RT 1039-1040].

Further, petitioner presented an alibi defense which the jury did not immediately reject (as evidenced by their request for a redback of the testimony of petitioner's uncle Rafael De La Paz Hernandez). [CT 253].

The fact that the jury deliberated for six days confirms that the case against petitioner was not overwhelming. [CT 251-252, 254, 257, 269-270, 272, 350].[13/] The jury submitted

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"Child" are not really homonyms. A homonym is defined as "one of two or more words spelled and pronounced alike but different in meaning," such as "the noun *quail* and the verb *quail*." Websters 9th New Collegiate Dictionary, page 578 (1989). Furthermore, while respondent's argument is not illogical, his conclusion is one that the factfinder must be permitted to reach (the jury at petitioner's trial was not required to reach the issue). This Court is not in the position to make a factual determination that Cruz actually said "Child," but the officer misheard him.

13. After three days, one juror was excused due to vacation plans and replaced by an alternate juror. [CT 257,

numerous questions to the trial court during their deliberations, including a request for a readback of the testimony of defense investigator Santamaria regarding his interview with Cruz (in which Cruz recanted his identification of petitioner), and the testimony of petitioner's uncle, Rafael De La Paz Hernandez (who testified that he saw petitioner in Mexico before and after the date of the offense). [CT 253, 260].[14/]

Cruz's statements to the police identifying petitioner were crucial to the prosecution's case and were not merely cumulative of other testimony or evidence. Cruz was the only witness to all of the relevant events. In addition, the manner of the admission of Cruz's statements - through the testimony of police officers and through a secretly videotaped police interview - lent them an undeserved aura of reliability. The prosecutor emphasized Cruz's statements in her closing argument, arguing that they were truthful, and reading from the transcript of Cruz's police interview. [See RT 2704-2709, 2765-2777].[15/]

Further, petitioner was denied any opportunity to cross-examine Cruz about (a) the inconsistencies in his statements, (b) his recantation of his identification of petitioner, and (c) his possible bias or motive to fabricate his story.

Considering the weaknesses of the prosecution's case, the importance of Cruz's erroneously admitted hearsay statements, and the denial of any opportunity to cross-examine Cruz, admission of Cruz's hearsay statements had a substantial and

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269-270].

14. The jury's request suggests that the uncertainty (or at least some of it) was about petitioner, not about co-defendant Gallardo).

15. In fact, the prosecutor argued that Cruz was justified in carrying a gun "for his own protection because he was concerned that the gang was going to finish him off." [RT 2708].

injurious effect on the jury's verdict. Accordingly, petitioner is entitled to relief.

In order to complete the record, the Court considers petitioner's remaining claims.

Petitioner's other challenges to the admission of Cruz's statements

1. State law error

To the extent that petitioner claims that Cruz's statements did not fall within the exception under section 1370 of the California Evidence Code, his claim fails to raise a cognizable federal question. See Estelle v. McGuire, 502 U.S. 62, 67-70 (1991); Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990).

2. Facial challenge to section 1370

"In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." Kolender v. Lawson, 461 U.S. 352, 355 (1983) (internal quotations and citation omitted).

The California Court of Appeal has concluded that Evidence Code section 1370 does not violate the Confrontation Clause because it contains particularized guarantees of trustworthiness and adequate indicia of reliability. Namely, the court has pointed out that the statute requires the statement to be made (1) at or near the time of the incident (similar to a spontaneous declaration) by a person who experienced the incident firsthand, (2) under circumstances indicating its trustworthiness, including whether it had been made in contemplation of litigation, whether the declarant had a bias or motive to fabricate and whether it is corroborated by other evidence not admissible under Evidence Code section 1370, and (3) to have been recorded in writing or electronically, or to have

been made to a police officer (who normally makes a written report of such statements). People v. Hernandez, 71 Cal.App.4th 417, 424 (1999). Further, the state court has explained that while corroboration by other evidence is not a legitimate component of trustworthiness under Wright, 497 U.S. at 829, "its presence in Evidence Code section 1370 does not render the statute unconstitutional because the section still requires the essential indicia of trustworthiness and it suggests other legitimate factors which may establish that. Absent a case where the trial court relied heavily upon the presence of corroborating evidence in making its determination that the statement bears indicia of reliability, the confrontation clause would not be violated." Hernandez, 71 Cal.App.4th at 424.

Because the state court has interpreted section 1370 as requiring sufficient indicia of reliability before hearsay may be admitted, section 1370 is not unconstitutional on its face.

Ineffective assistance of counsel

Petitioner alleges that his attorney provided ineffective assistance because he failed to "raise constitutional confrontation objections" to section 1370 of the California Evidence Code and to the admission of Cruz's hearsay statements.

In order to collaterally attack a conviction based upon the alleged ineffective assistance of his attorney, petitioner must satisfy the two prerequisites set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). First, petitioner must identify the acts or omissions of counsel that were not the result of reasonable professional judgment. Strickland, 466 U.S. at 687. "Such an assessment is highly deferential to defense counsel's decisions . . . with the attorney presumed to have rendered professionally adequate assistance." Lord v. Wood, 184 F.3d 1083, 1085 (9th Cir. 1999), cert. denied, 506 U.S. 856 (2000), citing Strickland, 466 U.S. at 690; see United States v. Cronic, 466 U.S. 648, 658 (1984). To

overcome this presumption, the petitioner must demonstrate that "the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690; see also Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995).

Petitioner also must prove that counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 693. To prove prejudice, petitioner must demonstrate that

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with a reasonable probability defined as "a probability sufficient to undermine confidence in the outcome."

Lord, 184 F.3d at 1085, quoting Strickland, 466 U.S. at 693-694.

Finally, the court can look first to determine prejudice and, if found, then determine whether counsel's actions fell below the standard of reasonable professional judgment. Strickland, 466 U.S. at 690. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697; Smith v. Robbins, 528 U.S. 259, 286 n.14 (2000); Williams v. Calderon, 52 F.3d 1465, 1469 (9th Cir. 1994).

The California Court of Appeal rejected petitioner's claim, explaining:

> Defendant Zamora stood to gain far more from acquiescing in Cruz's claim of unavailability than from cross-examining Cruz in front of the jury. Even if Cruz had testified, Cruz's October 6, 1999 statement, in which Cruz identified defendant Zamora as one of the shooters, would have been admitted, under Evidence Code section 1240 as a spontaneous statement. Trial counsel could reasonably have concluded defendant Zamora was helped more than harmed by the admission of the statement Cruz gave the police after October 30, 1999, in which, contrary

to his October 6, 1999 statement, Cruz stated defendant Zamora was not one of the shooters. Cruz testifying would not have protected defendant Zamora from the harm of having the jury hear Cruz's out-of-court statements if Cruz had recanted on the witness stand and testified consistently with the statement he gave the defense investigator. In that event, Cruz's out-of-court statements to the police would have been admitted as prior inconsistent statements under Evidence Code section 1235. Moreover, such recantation would have highlighted the damaging evidence of gang intimidation. Evidence impeaching Cruz's credibility - his prior convictions and membership in the Avenues gang - was admissible without Cruz testifying. With Cruz not testifying, defendant Zamora was able to argue, and did argue, the story about four Mexicans that Cruz told the defense investigator best fit the facts in the case and had the most convincing force, without the risk Cruz would explain the recantation on the witness stand as the product of gang intimidation. With Cruz not testifying, defendant Zamora was able to argue, and did argue, specific inconsistencies in the statements rendered the identification of Zamora not credible, without the risk Cruz would explain the inconsistencies in live testimony. Cruz's failure to testify also gave defendant Zamora an opportunity to argue, and he did argue to the jury: the jury could infer Cruz finally realized he could not "manipulate the system" with his lies anymore; the evidence against defendant Zamora was weak because the jury did not have a chance to see Cruz's demeanor; and it was unfair to defendant Zamora not to be able to cross-examine Cruz on Cruz's identification of defendant or ask Cruz whether it was rally true that four Mexicans had assaulted him. We conclude trial counsel's decisions regarding the admission of Cruz's statements resulted form an informed tactical choice within the range of reasonable competence. Trial counsel was not ineffective.

[Answer, Ex. C at 133-134].

The California Court of Appeal's determination of petitioner's claim is an unreasonable application of federal law.

Most importantly, the court's analysis rests entirely on counsel's failure to object to the finding that Cruz was unavailable. The state court assumed that counsel's objection to Cruz's invocation of his right against self-incrimination would have resulted in Cruz testifying at trial, which would not necessarily have helped petitioner. The court's entire analysis centers on the benefits of acquiescing in Cruz's unavailability to avoid having Cruz testify. While it makes sense that counsel might not challenge Cruz's unavailability, thereby securing Cruz's absence, it does not follow that counsel then would agree to the admission of Cruz's damaging hearsay statements identifying petitioner. Once Cruz was declared unavailable, it could only help petitioner to seek to exclude Cruz's statements identifying petitioner on Confrontation Clause grounds.

To begin with, the state court misread the record when it said that Cruz's October 6, 1999 statement, which was admitted as a spontaneous declaration, identified petitioner as one of the shooters. Cruz indicated that "Sparky" and "Chayo" shot him. As discussed, there was no clear, direct evidence that petitioner was known as either "Sparky" or "Chayo."

Furthermore, the state court's finding that counsel's failure to argue that the statements should be excluded under the Confrontation Clause was the result of an informed tactical choice is belied by the record. Counsel repeatedly and strenuously sought to exclude Cruz's statements, arguing that they should not be admitted under section 1370 of the California Evidence Code because they were not reliable, were not made at or near the time of the events, and because admission would deny him "the opportunity to cross-examine Mr. Cruz and to ask him about these obvious inconsistencies and contradictions, and to test whether or not he is, in fact,

telling the truth." [RT 1205-1206].[16] Thus, counsel clearly did not make a tactical decision to allow admission of Cruz's statements identifying petitioner.

Finally, petitioner was prejudiced by his counsel's deficient performance. As detailed above, Cruz's statements were inadmissible under the Confrontation Clause. Had petitioner's counsel moved to exclude them on that ground, they would not have been presented at trial. If the jury did not hear Cruz's out of court statements identifying petitioner as one of the assailants, there is a reasonable likelihood of a more favorable outcome. Accordingly, petitioner is entitled to relief on the basis of this claim.

Petitioner's sentencing claim

Petitioner alleges that he was deprived of due process because the trial court erroneously imposed a sentence enhancement for firearm use by a principal in a crime because there was no finding that "a particular defendant used a firearm."

Federal habeas relief is not available for alleged errors in the interpretation or application of state law. Rather, the Court is limited to deciding whether the petitioner has been convicted or sentenced in violation of the Constitution, laws or treaties of the United States. Estelle, 502 U.S. at 67-68; Peltier v. Wright, 15 F.3d 860, 861-862 (9th Cir. 1994). As one court has explained:

> In a habeas corpus proceeding, a federal court will examine a state court's interpretation of its laws or constitution only where it is clearly shown that such state judicial interpretations violate fundamental rights guaranteed by the Constitution of the United States.

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16. Although counsel mentioned denial of the opportunity to cross-examine Cruz, his comments were made in the context of section 1370 of the California Evidence Code.

Howard v. Craven, 306 F.Supp. 730, 732 (C.D. Cal. 1969).

There are two ways in which an error in the application or interpretation of state law may be cognizable on federal habeas review. First, the error may violate a specific provision of the Constitution, such as the Eighth Amendment prohibition against cruel and unusual punishment. Second, the error may rise to a due process violation if the application or interpretation of state law is arbitrary or renders the proceedings fundamentally unfair. Richmond v. Lewis, 506 U.S. 40, 50 (1992); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Newton v. Superior Court of California, 803 F.2d 1051, 1055 (9th Cir. 1986), cert. denied, 481 U.S. 1070 (1987). For example, where sentencing error is alleged to violate the Due Process Clause of the Fourteenth Amendment, federal habeas relief is justified only upon a showing that the state court's misapplication of its sentencing laws was fundamentally unfair. See Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994); Bueno v. Hallahan, 988 F.2d 86, 88 (9th Cir. 1993); cf. Ballard v. Estelle, 937 F.2d 453, 456 (9th Cir. 1991) (suggesting that a due process violation may arise if state sentencing law was misapplied); see also Whalen v. United States, 445 U.S. 684, 689-690 n.4 (1980) (stating that due process presumably prohibits state courts from depriving persons of liberty except to extent authorized by state law).

Notwithstanding petitioner's conclusory allegations of a due process violation, petitioner's claim involves solely issues of state law. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.) (explaining that a federal petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process."), cert. denied, 522 U.S. 881 (1997); Miller v. Vasquez, 868 F.2d 1116, 1118 (9th Cir. 1989) (rejecting a claim questioning whether assault with a deadly weapon qualified as a "serious felony" under state sentencing enhancement provisions as a "question of state sentencing law."). Therefore, petitioner's sentencing claim is not cognizable on federal collateral review.

Moreover, petitioner's claim was rejected by the state

courts. The California Court of Appeal discussed the applicable state sentencing law, and concluded that the enhancement did not require a finding that a specific defendant personally discharged a firearm or that another person had been convicted of the underlying offense and found to have discharged a firearm. [Answer, Ex. C at 138-140]. Thus, the state court found no misapplication of state law. This Court is bound by the determination that there was no state law error, a determination that is neither arbitrary nor fundamentally unfair. See Peltier, 15 F.3d at 862 (citing Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)).

For these reasons, petitioner is not entitled to relief on the basis of this claim.

5. Sufficiency of the evidence

Petitioner alleges that the evidence was insufficient to support the conviction for attempted murder. [Petition at 6a].

Under clearly established federal law, a claim of insufficient evidence requires a review of the trial record to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). In making this determination, the Court does not "ask itself whether it believed that the evidence at the trial established guilt beyond reasonable doubt." Jackson, 443 U.S. at 318-319. Rather, the court views the evidence in the light most favorable to the prosecution, and presumes that the trier of fact had resolved the conflicting evidence in favor of the prosecution. Jackson, 443 U.S. at 319, 326; see Payne v. Borg, 982 F.2d 335, 338-339 (9th Cir. 1992), cert. denied, 510 U.S. 843 (1993). "[T]he prosecution need not affirmatively 'rule out every hypothesis except that of guilt'; and . . . a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and

must defer to that resolution.'" Wright v. West, 505 U.S. 277, 296-297 (1992), quoting Jackson, 443 U.S. at 326.

Further, under the AEDPA, petitioner is not entitled to relief unless the California courts' decision that the evidence was sufficient to support petitioner's conviction was contrary to or an unreasonable application of Jackson. See Mitchell v. Prunty, 107 F.3d 1337, 1340 n.3 (9th Cir. 1997) (explaining that the AEDPA did not apply to petition, which raised meritorious claim of insufficient evidence, but noting that even if it did apply, the outcome would be the same because the state appellate court's application of the Jackson standard was not reasonable); Gomez v. Acevedo, 106 F.3d 192, 198 (7th Cir. 1997) (holding that under AEDPA, habeas relief is not available for a claim of insufficient evidence unless the state court's application of Jackson was unreasonable).

Petitioner raised his claim regarding the insufficiency of the evidence to the California Court of Appeal, which rejected it.[17] The court explained:

> In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The federal standard of review is to the same effect: under principles of federal due process, review for sufficiency of the evidence entails not the determination whether the reviewing court itself

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17. The California Supreme Court rejected petitioner's claims without explanation. [Answer, Ex. F]. This Court "looks through" the unreasoned decision of the California Supreme Court to the last reasoned decision by a state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803-806 (1991); Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), cert. denied, 534 U.S. 944 (2001).

believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

* * * * *

Attempted murder requires specific intent to kill. All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed. Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. For attempted murder, where the charged offense is the same as the intended offense, the aider and abettor must know and share the murderous intent of the actual perpetrator.

Substantial evidence supports a finding defendant Zamora possessed the required intent to kill Cruz both as the actual perpetrator and an aider and abettor. Defendant Zamora's intent to kill can reasonably be inferred from the evidence of gun shots to Cruz's head and Cruz's October 6, 199 statement to the police identifying defendant Zamora as one of the shooters. This was substantial evidence defendant Zamora directly committed the act constituting attempted murder. In the subsequent statements, Cruz identified Riley and Ponce, not defendant Zamora, as the shooters. Defendant Zamora participated in trying to force Cruz into the trunk of a car after defendant Zamora and the other assailants had beaten him and knocked him down. When that effort failed, he helped drag Cruz into his apartment. These facts indicate defendant Zamora intended that Cruz should be removed from public view so that he could be killed. In defendant

> Zamora's presence, Riley told Cruz he was going to kill him, which indicates defendant Zamora knew Riles had an express intent to kill Cruz. The attack on Cruz escalated from a demand for money, to a beating, to brandishing weapons and threatening to kill, to shooting him the head and leg. Defendant Zamora continued to participate in the attack after the shooters had drawn their guns and threatened to kill Cruz, and after Cruz had been shot. This evidence indicates defendant Zamora shared the murderous intent of the actual shooters. The evidence was sufficient to prove defendant had the required specific intent to be convicted of attempted murder.

[Answer, Ex. C at 134-136 (quotations and citations omitted)].

The state court's determination is reasonable and is supported by this Court's independent review of the evidence.[18] Based upon the evidence admitted at trial, jurors reasonably could infer that petitioner joined his cohorts in their intent to kill Cruz and either shot Cruz or aided in the shooting. Contrary to petitioner's assertion, the fact that the shooters were not able to actually kill Cruz does not require an inference that the shooters merely intended to inflict a nonfatal injury. Accordingly, petitioner is not entitled to relief on the basis of this claim.

Conclusion

Because petitioner was convicted on the basis of highly prejudicial inadmissible hearsay evidence in violation of the Sixth Amendment, petitioner did not receive the constitutional protections to which all persons, good or bad, are entitled when

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18. The Court's analysis includes consideration of the improperly admitted hearsay statements of Cruz, since this evidence was presented to the jury. The Court expresses no opinion as to the sufficiency of the evidence without Cruz's hearsay statements.

charged with a criminal offense in the United States. Therefore, it is recommended that judgment be entered (a) granting the petition on petitioner's Confrontation Clause and ineffective assistance of counsel claims, (b) denying the petition as to the remaining claims, and (c) directing respondent to release petitioner unless the State of California provides petitioner with a new trial within one hundred and twenty (120) days from the date of entry of judgment.

DATED: 9/30/03

/S/
ANDREW J. WISTRICH
United States Magistrate Judge

APPENDIX D

SUPREME COURT
FILED
JAN -3 2002
Frederick K. Ohlrich Clerk

Deputy

Court of Appeal, Second Appellate District,
Division Five - No. B143091
S102034

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROBERTO R. GALLARDO et al.,
Defendants and Appellants.

Petitions for review DENIED.

GEORGE
Chief Justice

APPENDIX E

COURT OF APPEAL - SECOND DIST.
FILED
OCT 11 2001
JOSEPH A. LANE Clerk

Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO R. GALLARDO et al., Defendants and Appellants.	B143091 (Super. Ct. No. BA193636)

APPEAL from the judgments of the Superior Court of Los Angeles County. John Fisher, Judge. Affirmed as modified.

Jill Lansing, under appointment by the Court of Appeal, for Defendant and Appellant Roberto R. Gallardo.

Gregory L. Rickard, under appointment by the Court of Appeal, for Defendant and Appellant Javier Zamora.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief

Assistant Attorney General, Marc E. Turchin, Acting Senior Assistant Attorney General, Linda C. Johnson and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Roberto Gallardo and Javier Zamora appeal from judgments following a jury trial in which they were convicted of attempted murder, assault with a firearm, attempted robbery, and assault by means likely to produce great bodily injury. Criminal street gang and firearm use allegations were found true. Defendant Zamora contends the trial court erred in admitting the victim's out-of-court statements, the evidence of intent to kill is insufficient to support the attempted murder conviction, the assault counts and armed with a firearm enhancement should have been stricken, and the abstract of judgment is incorrect. Defendant Gallardo contends the identification evidence is insufficient to support his convictions. Both defendants contend the evidence was insufficient to support the criminal street gang and discharge of a firearm enhancements, and trial counsel were ineffective. We strike the armed with a firearm enhancements imposed on the assault with a firearm convictions and correct the abstracts of judgment. In all other respects, we affirm the judgments.

PROCEDURAL BACKGROUND

Defendants were charged by information with: the attempted willful, deliberate, and premeditated murder of Hugo Cruz on October 6, 1999, in violation of Penal Code sections 664 and 187, subdivision (a),[1/] with the further allegation, pursuant to section 12022.53, subdivisions (c) and (e)(1), that a principal discharged a firearm; assault on Cruz with a firearm on October 6, 1999, in violation of section 245, subdivision (a)(2), with the further allegation pursuant to section 12022,

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1. All further statutory references are to the Penal Code, except where otherwise indicated.

subdivision (a)(l) that a principal was armed with a firearm; attempted second degree robbery of Cruz on October 6, 1999, in violation of sections 664 and 211, with the further allegation, pursuant to section 12022.53, subdivisions (c) and (e)(l), that a principal discharged a firearm; and assault on Cruz on October 6, 1999, by means likely to produce great bodily injury, in violation of section 245, subdivision (a)(l). As to each count it was further alleged, pursuant to section 186.22, subdivision (b)(l), that the offense was committed for the benefit of a criminal street gang.

The jury found defendants guilty of attempted murder, assault with a firearm, attempted second degree robbery, and assault by means likely to produce great bodily injury. The allegation the attempted murder was committed willfully, deliberately, and with premeditation was found not true. The principal armed, criminal street gang, and discharge of a firearm allegations were found true. Defendants were each sentenced to a total term of 29 years, as follows: nine years (the upper term) for attempted murder plus 20 years for the discharge of a firearm allegation; and four years for assault with a firearm, three years for attempted robbery, four years for assault by means likely to produce great bodily injury, and one year for the principal armed allegation, which terms, as well as the sentences for the allegations, were stayed pursuant to section 654. This timely appeal followed.

FACTS

Hugo Cruz was a member of the Avenues gang. He had a history of selling drugs. On October 6, 1999, at 10:00 p.m., four other members of the Avenues gang, defendant Zamora, defendant Gallardo, Harold Riley, and Marvin Ponce[2/]

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2. We have reviewed the superior court file. Riley and Ponce were also charged. Riley has not been arrested. Pursuant to a plea agreement, Ponce, who was arraigned six months after

approached Cruz outside his apartment building, demanding money. When Cruz refused, the four men beat him, knocked him down, and kicked him. Defendant Zamora, Riley, and Ponce dragged Cruz into Cruz's apartment. While defendant Gallardo remained outside as a look-out, defendant Zamora, Riley, and Ponce continued to hit Cruz and ransacked the apartment. Two of the men brandished guns, stating they would kill Cruz. Cruz told them he had no money to give them. Cruz was then shot in the head and leg. The four men ran away.

The police arrived at 10:30 p.m. Cruz locked the door and did not let them in. The police broke down the door with an ax in order to gain entry. They found Cruz somewhat dazed and covered with blood. The apartment was in a ransacked and bloody condition and the top of the toilet tank was resting on a stool. A baggie containing a small amount of white powder was found. When asked who did this to him, Cruz replied, "I don't know why [Riley] did this." Cruz was reluctant to talk to the police. He hesitated to be specific concerning the incident. He initially refused medical treatment at the scene, although, after resisting, he allowed himself to be taken to the hospital. The information he gave the police had to be pried out of him, and he did not give details. Cruz stated four Avenues gang members whom he identified as Riley, defendant Zamora, Ponce, and a fourth person, whose name he did not know, came to his apartment and demanded money. When he told them he had no money, Riley and defendant Zamora produced handguns and threatened him. When he again refused to give them money, Riley and defendant Zamora shot him.

On October 8, 1999, Cruz identified the four assailants, including defendants, from photographs in the Avenues gang

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defendants were arrested, was convicted of attempted murder in violation of sections 664 and 187, subdivision (a). Special allegations pursuant to sections 12022.7, subdivision (a) and 12022.5, subdivision (a)(l) were found true. He was sentenced to 13 years in state prison.

mug book. He named Riley, defendant Zamora, and Ponce, but he could not remember defendant Gallardo's name. However, he refused to sign his name on the photographs he had identified.

On October 30, 1999, Cruz was arrested for being a felon in possession of a firearm. The police interviewed him when he was in jail subsequent to the arrest. This interview took place within several days after Saturday, October 30, 1999, the day he was arrested. Cruz told the police the following. As he was leaving his apartment on October 6,1999, Riley and Ponce arrived and demanded money. He told them he had no money to give them, and then defendants arrived. Riley, Ponce, and defendant Gallardo spoke together in whispers. Then they all started to hit him. They tried to put him in the trunk of their car, but he successfully resisted. In the apartment, Riley and Ponce pulled out guns. Riley said he was going to kill Cruz. Then Cruz was shot. They continued to fight with him. They insisted they wanted money and kept looking for money. They stole Cruz's wallet, which contained $80, rings, a gold chain, and a CD player. Cruz identified photographs of defendants, Riley, and Ponce. He identified defendant Gallardo by name. Cruz stated he did not remember talking to the police on the night of the crime. On several occasions shortly after he had come home from the hospital, representatives from the gang told Cruz everything was fine and the gang would not bother him any more. Cruz believed the gang still wanted to kill him. Cruz denied the gang was trying to collect money from him for selling drugs.

Gilberto Rodriguez witnessed the assault outside the apartment building. Rodriguez gave information to the police on October 7, 1999, when the police picked him up for truancy. Rodriguez never saw Cruz after October 6, 1999. Rodriguez was an Avenues gang member and knew defendants. He identified defendants as two of Cruz's assailants. He selected their pictures from a gang photo book. Rodriguez told the police that defendants, Riley, and Ponce beat and kicked Cruz.

The four men dragged Cruz inside his apartment, while continuing to hit him. Defendant Gallardo then went back outside to watch the street. Rodriguez was worried the gang would retaliate against him and his family, because he had told the police the identity of the gang members who had assaulted Cruz.

DISCUSSION

I. Cruz's Out-Of-Court Statements

A. Unavailability

Defendant Zamora contends the trial court should not have found Cruz unavailable to testify without first having required Cruz to take the stand and assert his Fifth Amendment privilege on a question-by-question basis. We conclude the contention was waived.

Cruz's criminal case was pending when Cruz was subpoenaed by the prosecutor to testify in defendants' trial. Cruz told the trial court he did not want to testify because he believed it would make him subject to cross-examination in his own case.[3] He exercised his Fifth Amendment privilege not to testify. The trial court stated: "All right. Anything to be said by any lawyer with respect to that representation? [¶] All right. Is there any -- I don't think we needed to ask him any questions. I mean, if everybody agrees he has such a right, we don't have to go through the drill of doing that unless I am told that I'm supposed to, but I don't think we necessarily have to do that. [¶] So unless there is any other comment, then we'll just declare that he is an unavailable witness, legally. And he will not be called as a witness by anybody, but he is subject to impeachment once they put on his prior statement, and we can

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3. Cruz told the police he had the gun because he feared retaliation by the gang.

go through all that later." Defendant Zamora did not object. The statements Cruz made to the police on October 6, 1999, October 8, 1999, and after October 30, 1999, were admitted in evidence.

Evidence Code section 1370 provides, in pertinent part, as follows. "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240.[4] [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to . . . a law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section."

"[B]efore a claim of privilege can be sustained, the witness should be put under oath and the party calling him be permitted to begin his interrogation. Then, the witness may invoke his privilege with regard to the specific question and the court is in a position to make the decision as to whether the answer might

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4. Evidence Code section 240 provides, in pertinent part, "'[u]navailable as a witness' means that the declarant is . . . [¶] . . . [e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant."

tend to incriminate the witness." (*People v. Harris* (1979) 93 Cal.App.3d 103, 117.) It is improper for a trial court to sustain the invocation of the privilege without conducting proceedings in this manner. (*Ibid.*) However, a party's acquiescence to the improper procedure waives objection to it on appeal. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251 [where the defendant had conceded the witness's exercise of his Fifth Amendment privilege rendered him unavailable, "[h]e may not be heard to complain [on appeal] of the court's determination in conformity with his concession"]; *People v. Malone* (1988) 47 Cal.3d 1, 35 ["defense counsel did not object to the challenged procedure, but rather, acquiesced in it; hence defendant may not complain on appeal"]; see also Evid. Code, § 353.)

Defendant Zamora did not object to the finding Cruz was unavailable. Accordingly, his contention on appeal is waived.

B. Other Requirements of Evidence Code Section 1370[5]

Defendant Zamora contends the statement Cruz made to the police after October 30, 1999, was inadmissible pursuant to Evidence Code section 1370, subdivision (a)(3), because it was not made at or near the time of the incident. This contention was waived by defendant Zamora's failure to object on that ground in the trial court. (Evid. Code, § 353, subd. (a); *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425 [failure to object the evidence does not satisfy the requirements of Evidence Code section 1370 waives the objection on appeal].)

Defendant Zamora also contends the statements Cruz made on October 8, 1999, and after October 30, 1999, were inadmissible pursuant to Evidence Code section 1370, subdivision (a)(4), because they were not made under

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5. We have taken judicial notice of the information and minute orders of April 11, 2000, and June 16, 2000, in *People v. Cruz*, case no. BA194363.

circumstances indicating they were trustworthy. We disagree with the contention.

A finding that evidence is admissible under Evidence Code section 1370 is reviewed for abuse of discretion. (*People v. Hernandez, supra*, 71 Cal.App.4th at pp. 424-425.)

The trial court did not abuse its discretion in concluding the statements of October 8, 1999, and after October 30, 1999, were made under circumstances indicating trustworthiness. The statements were consistent with the statements made on October 6, 1999, which bore indicia of trustworthiness. Because of Cruz's injuries, it is reasonable to infer it was not possible for the police to interview Cruz at the scene concerning all the details of the incident. The later statements were elaborations of the earlier statement. The October 6th statement was made immediately after Cruz had been assaulted, at a time when Cruz was still under the stress of the incident. Cruz was extremely reluctant to talk to the police. The identifications of fellow gang members subjected Cruz to a risk of gang retaliation. There was no evidence Cruz had a motive to fabricate the identifications. These circumstances indicated the reliability of the statements. Cruz did not remember he had spoken to the police on October 6, 1999. The information he gave the police subsequently was consistent with the information he had given on October 6, 1999. These circumstances indicate Cruz did not fabricate his story. He never wavered in his identifications. The photographs he selected on October 8, 1999, and after October 30, 1999, were photographs of the three men he had identified by name on October 6, 1999, and of the fourth man, whose name he had not remembered. Rodriguez, who witnessed the assault, corroborated Cruz's identification of defendants. Rodriguez's identification was made under circumstances indicating trustworthiness, in that, as a fellow gang member, he, too, risked retaliation from the gang for identifying gang members, and he knew defendants. Further, the fact Rodriguez did not talk to Cruz at any time after the incident indicates an absence of collusion between Rodriguez

and Cruz to implicate defendants. The trial court did not abuse its discretion in concluding Cruz's statements were trustworthy.[6]

C. Confrontation Clause

Defendant Zamora contends Evidence Code section 1370 is unconstitutional on its face because it deprives defendants of their rights to confrontation and due process. Defendant Zamora also contends admission of Cruz's statements violated the Confrontation Clause, because the statements do not fall within a firmly rooted hearsay exception. Defendant Zamora did not make these challenges in the trial court. Consequently, the contentions are waived. (*People v. Hernandez, supra,* 71 Cal.App.4th at pp. 422, 425.) Moreover, the court in *Hernandez* concluded Evidence Code section 1370 does not violate the Confrontation Clause. (*Id.* at pp. 423-424.) We find no reason to disagree.

D. Ineffective Assistance of Counsel

Defendant Zamora contends trial counsel was ineffective for failing to object to the admission of Cruz's out-of-court statements on grounds Cruz was not unavailable and admission of the statements violated Cruz's constitutional rights. We disagree.

A defense investigator, who interviewed Cruz in jail in February 2000, testified Cruz had recanted his identification of defendants. Cruz told the investigator some 50 year old men from Mexico, not Avenues gang members, had attacked him. They wanted to buy drugs. Cruz told the investigator he would

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6. For this reason, we also disagree with defendant Zamora's contention admission of the statements violated the Confrontation Clause and due process in that they lacked indicia of trustworthiness.

not sign a statement, however, because he wanted to tell his story in court, in the presence of defendants, to show defendants he had not accused them.

"Both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant effective assistance of counsel. [Citations.] The right of a criminal defendant to counsel 'entitles the defendant not to some bare assistance but rather to *effective* assistance. . . . This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation.'" (*In re Gay* (1998) 19 Cal.4th 771, 789, original italics, citations omitted.) "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. . . . 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . .' and must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication . . . courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1211.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "[W]here the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed." (*People v. Pope* (1979) 23 Cal.3d 412, 425.)

Defendant Zamora stood to gain far more from acquiescing in Cruz's claim of unavailability than from cross-examining Cruz in front of the jury. Even if Cruz had testified, Cruz's October 6, 1999 statement, in which Cruz identified defendant Zamora as one of the shooters, would have been admitted under Evidence Code section 1240 as a spontaneous statement. Trial counsel could reasonably have concluded defendant Zamora was helped more than harmed by the admission of the statement Cruz gave the police after October 30, 1999, in which, contrary to his October 6, 1999 statement, Cruz stated defendant Zamora was not one of the shooters. Cruz testifying would not have protected defendant Zamora from the harm of having the jury hear Cruz's out-of-court statements if Cruz had recanted on the witness stand and testified consistently with the statement he gave the defense investigator. In that event, Cruz's out-of-court statements to the police would have been admitted as prior inconsistent statements under Evidence Code section 1235. Moreover, such recantation would have highlighted the damaging evidence of gang intimidation. Evidence impeaching Cruz's credibility–his prior convictions and membership in the Avenues gang–was admissible without Cruz testifying. With Cruz not testifying, defendant Zamora was able to argue, and did argue, the story about four Mexicans that Cruz told the defense investigator best fit the facts in the case and had the most convincing force, without the risk Cruz would explain the recantation on the witness stand as the product of gang intimidation. With Cruz not testifying, defendant Zamora was able to argue, and did argue, specific inconsistencies in the statements rendered the identification of defendant Zamora not credible, without the risk Cruz would explain the inconsistencies in live testimony. Cruz's failure to testify also gave defendant Zamora an opportunity to argue, and he did argue to the jury: the jury could infer Cruz finally realized he could not "manipulate the system" with his lies anymore; the evidence against defendant Zamora was weak because the jury did not have a chance to see Cruz's demeanor; and it was unfair

to defendant Zamora not to be able to cross-examine Cruz on Cruz's identification of defendant or ask Cruz whether it was really true that four Mexicans had assaulted him. We conclude trial counsel's decisions regarding the admission of Cruz's statements resulted from an informed tactical choice within the range of reasonable competence. Trial counsel was not ineffective.

II. Sufficiency of the Evidence

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a

contrary finding does not warrant a reversal of the judgment.'" [Citations.]"' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

A. Identification of Defendant Gallardo

Defendant Gallardo contends the evidence was insufficient to support a finding he was one of the assailants. We are not persuaded by the contention.

Substantial evidence supports a finding defendant Gallardo was one of the assailants. Gallardo was identified by the victim and the eyewitness. Both knew him. "[I]nconsistencies in identification evidence are for the jury to resolve." (*People v. Ford* (1981) 30 Cal.3d 209, 215.)

B. Intent To Kill[7]

Defendant Zamora contends the evidence was insufficient to prove defendants intended to kill Cruz. Defendant Zamora lacks standing to raise an issue concerning defendant Gallardo's intent. We disagree with the contention concerning defendant Zamora's intent.

Attempted murder requires specific intent to kill. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) "'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' [Citations.] Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*Id.* at pp. 1116-1117.) For attempted murder, where the charged offense is the same as the intended offense, "the aider and abettor must know and share the murderous intent of the actual perpetrator." (*Id.* at p. 1118.)

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7. We have reviewed the videotape of Cruz's interview with the police after his arrest on October 30, 1999.

Substantial evidence supports a finding defendant Zamora possessed the required intent to kill Cruz both as the actual perpetrator and an aider and abettor. Defendant Zamora's intent to kill can reasonably be inferred from the evidence of gun shots to Cruz's head and Cruz's October 6, 1999 statement to the police identifying defendant Zamora as one of the shooters. This was substantial evidence defendant Zamora directly committed the act constituting attempted murder. In the subsequent statements, Cruz identified Riley and Ponce, not defendant Zamora, as the shooters. Defendant Zamora participated in trying to force Cruz into the trunk of a car after defendant Zamora and the other assailants had beaten him and knocked him down. When that effort failed, he helped drag Cruz into his apartment. These facts indicate defendant Zamora intended that Cruz should be removed from public view so that he could be killed. In defendant Zamora's presence, Riley told Cruz he was going to kill him, which indicates defendant Zamora knew Riley had an express intent to kill Cruz. The attack on Cruz escalated from a demand for money, to a beating, to brandishing weapons and threatening to kill, to shooting him in the head and leg. Defendant Zamora continued to participate in the attack after the shooters had drawn their guns and threatened to kill Cruz, and after Cruz had been shot. This evidence indicates defendant Zamora shared the murderous intent of the actual shooters. The evidence was sufficient to prove defendant Zamora had the required specific intent to be convicted of attempted murder.

C. Gang-Related Purpose

Defendant Gallardo contends an educated guess that the crime was for gang-related purposes was insufficient to support the gang enhancement. Defendant Zamora joins in the contention. We disagree.

Officer Isidro Rodriguez, an expert concerning the Avenues gang, believed the gang sent the four assailants to

enforce the gang's tax on selling drugs. The tax was $50 per week. A gang member who failed to pay the tax would be beaten or shot. "[T]his is a form of discipline that the gang is sending to this person. They are sending the message that if you don't pay, you're going to be disciplined, and they'll do it by beating you up, assaulting you and even killing you. It also sends a message to other gang members that if you're asked to do something and you don't comply, these are the consequences." "[T]hey would do what they call a touch up, which is beat you up, assault you, and if they feel you're no good, then they will ultimately try to kill you."

Officer Rodriguez's opinion was supported by substantial evidence. Cruz's prior convictions for narcotics sales and statement he was attacked by four Mexicans who wanted to obtain drugs from him, and the presence in his apartment of a baggie containing a white substance that appeared to be drugs, indicate he currently sold drugs. The fact that the cover had been taken off of the toilet tank indicates the assailants were looking for drugs, which, in turn, indicates they believed Cruz sold drugs. The assailants were members of the gang Cruz belonged to, demanded money, ransacked the apartment, and stole Cruz's CD player, jewelry, and money. These facts indicate they were there to collect money Cruz owed to the gang. Only one baggie was found by the police, suggesting that any other drugs that had been in the apartment had been stolen by the assailants. It can reasonably be inferred from Cruz's denial the assailants were trying to collect a tax that Cruz did not want to admit to the police he currently engaged in illegal narcotics activity. There was evidence Avenues gang members murdered and assaulted fellow gang members in order to discipline them for violating gang rules and intimidate other gang members to follow gang rules. It can reasonably be inferred from this evidence that the attack of Cruz was for a gang purpose. Indeed, it is difficult to imagine any purpose other than a gang purpose when four gang members attack a fellow gang member. Moreover, Cruz was advised after the

attack by other Avenues gang members that nothing further would be done to him by the gang. The finding the crime was for a gang-related purpose was supported by substantial evidence.

D. Enhancement Under Section 12022.53, subdivisions (c) and (e)

Defendants contend the evidence was insufficient to support the imposition of a 20-year enhancement under section 12022.53 because there was no finding either of them had personally used a firearm and no proof Riley or Ponce had been convicted of attempted murder and found to have personally used a firearm. We disagree with the contention.

Section 12022.53, subdivision (c) provides, in pertinent part: "Notwithstanding any other provision of law, any person who is convicted of [attempted murder], and who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."

Section 12022.53, subdivision (e) provides: "(1) The enhancements specified in this section shall apply to any person[] charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved. [¶] (2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1, [8] shall

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8. The jury found true an allegation pursuant to section 186.22, subdivision (b)(1), which provides: "Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific

not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

Nothing in the statute requires findings that a specific defendant personally discharged a firearm or another person had been convicted of the underlying offense and found to have discharged a firearm. The statute imposes the discharge of a firearm enhancement on all principals in the underlying offense if a criminal street gang allegation under section 186.22, subdivision (b) has been found true. The enhancement for discharge of a firearm can be sustained as to an aider and abettor without the enhancement having been sustained as to the co-principal who personally discharged a firearm, if there is evidence the co-principal discharged the firearm. (Cf. *People v. Font* (1995) 35 Cal.App.4th 50, 58 [where there was evidence a co-principal was armed with a firearm, sufficient evidence supported sustaining the armed with a firearm enhancement under section 12022, subdivision (a)(l) as to the defendant who was vicariously liable, even though the jury did not find the co-principal guilty of the underlying offense; compare *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281 [section 12022.53 subdivision (e)(l) provides that the 15-year minimum term specified in section 186.22, subdivision (b)(5) "'shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.'"], mod. 90 Cal.App.4th 886a.)

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intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, . . . [i]f the felony is a violent felony, as defined in subdivision (c) of Section 667.5, . . . be punished by an additional term of 10 years."

The jury found as to each defendant a principal discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1) and found true the criminal street gang allegation. We have previously concluded substantial evidence supported the criminal street gang allegation. Cruz was hit by gun fire twice in the head and twice in the leg. Cruz and Rodriguez stated two of the assailants discharged firearms in the commission of the offenses. This is substantial evidence supporting the discharge of a firearm allegation. Moreover, Cruz's statement that, when he did not accede to the assailant's demand for money, defendant Zamora threatened him with a gun and then shot him was evidence defendant Zamora personally discharged a firearm in the commission of the offense.

III. Ineffective Assistance of Counsel For Failing To Request Limiting Instruction

Defendants contend counsel was ineffective in failing to request a limiting instruction, CALJIC No. 2.09,[9] concerning the evidence that had been admitted to prove the criminal street gang allegation.

The evidence that was admitted for the limited purpose of proving the criminal street gang allegation was Officer Rodriguez's testimony concerning his opinion that the purpose of the crime was to enforce the gang's tax on narcotics sales by gang members.

Defendant Gallardo argued to the jury that most of the

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9. CALJIC No. 2.09 states: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

gang evidence had no relevance to the identification of the perpetrators. He warned the jurors to "be sure that your minds are not poisoned by all of this evidence . . . . Especially when those things are primarily introduced to create an atmosphere negative to the defendants." Defendant Zamora characterized the evidence as "smoke and mirrors . . . introduced . . . to confuse you, because they know their case is weak. They know that they don't have any evidence on [defendants]. So what? Let's convict them of being gang members." "[T]he gang evidence is [too] obscure, to confuse you about what really happened in this case."

Not requesting a limiting instruction was a reasonable tactical choice by trial counsel to avoid directing the jury to focus on the specific gang evidence that proved the criminal street gang allegation. Not limited in admissibility was evidence defendants were gang members and two of the assailants. The limiting instruction did not have to be given in order for defendants to use to their advantage the fact the prosecution presented extensive gang evidence. Without the limiting instruction, defendants could characterize all the prosecution's gang evidence as an unfair attempt to trick the jury to convict defendants solely on the basis of membership in the gang because the prosecution knew its case was weak on the merits. The decision not to request a limiting instruction did not render the assistance of trial counsel ineffective.

Moreover, the gang evidence was admissible on the issues of identification, intent, and motive. Thus, a request for a limiting instruction would have been denied or the limiting instruction would have been extremely circumscribed. In addition, the absence of the instruction was harmless.

IV. Two Assault Charges Should Not Be Stricken

Defendant Zamora contends the convictions for assault with a firearm and assault by means of force likely to inflict great bodily injury should be stricken because they "were part

of a single, on-going assaultive crime." We disagree.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . ." A defendant may be convicted of multiple offenses based on "a single act or indivisible course of conduct[,]" but multiple convictions based on necessarily included offenses are prohibited. (*People v. Pearson* (1986) 42 Cal.3d 351, 354-355.) Assault with a firearm and assault with a deadly weapon are not lesser included offenses of attempted murder. (*People v. Young* (1981) 120 Cal.App.3d 683, 689-690; *People v. Johnson* (1978) 81 Cal.App.3d 380, 388-389; *People v. Benjamin* (1975) 52 Cal.App.3d 63, 71.) Accordingly, the trial court was not required to strike the two assault offenses, but properly stayed the sentences under section 654.

V. The Armed With A Firearm Enhancement Should Be Stricken

Defendant Zamora contends the allegation, pursuant to section 12022, subdivision (a)(l), that a principal was armed with a firearm should be stricken from the conviction of assault with a firearm because a principal being armed is an element of the underlying offense. Respondent agrees. The contention is correct. (See § 245, subd. (a)(2).) We will strike the enhancement pursuant to section 12022, subdivision (a)(l).

VI. Abstract of Judgment

The trial court sentenced defendants to an additional 20

years under section 12022.53, subdivisions (c) and (e) for the gang-related discharge of a firearm enhancement. Defendants' abstracts of judgment mistakenly indicate the 20-year enhancement was made up of a 10-year sentence for the gang enhancement (§ 186.22) and a 10-year sentence for the discharge of a firearm enhancement. Defendant Zamora contends the abstract of judgment should be corrected. We will direct the trial court to order that both abstracts of judgment be corrected to reflect the imposition of a 20-year term under section 12022.53, subdivisions (c) and (e)(1).

DISPOSITION

The enhancement pursuant to section 12022, subdivision (a)(1) imposed on count 2 (assault with a firearm) with respect to each defendant is stricken. The clerk of the superior court is directed to amend each defendant's abstract of judgment to reflect the striking of the section 12022, subdivision (a)(1) enhancement and the imposition of a 20-year term under section 12022.53, subdivisions (c) and (e)(1), and forward the corrected abstracts to the Department of Corrections. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

/S/
GRIGNON, Acting P.J.

We concur:

/S/
ARMSTRONG, J.

/S/
WILLHITE, J.*

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* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ORIGINAL

(2)

No. 05-809

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DARREL G. ADAMS, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

JAVIER ZAMORA, *Respondent*

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner asks this court to resolve a lower court conflict about whether *Crawford* applies retroactively in federal habeas corpus proceedings under *Teague* or 28 U.S.C. 2254(d).

Respondent claims the question presented is whether this is an appropriate case to decide the issue raised by petitioner given that there are independent pre-*Crawford* grounds to affirm the decisions below that the admission of declarant's statements violated the Confrontation Clause.

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No. 05-809

IN THE SUPREME COURT OF THE UNITED STATES

DARREL G. ADAMS, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

JAVIER ZAMORA, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Javier Zamora respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT[1]

Introduction

The district court granted Zamora's § 2254 petition because his Sixth Amendment right to confront his accuser "Cruz" was violated. The court found under *Ohio v. Roberts*, 448 U.S. 56 (1980), that the prosecution failed to prove Cruz was unavailable or his statements reliable.

While the State's appeal was pending in the Ninth Circuit, the Supreme Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that statements of unavailable witnesses may not be admitted unless the defendant has a prior opportunity for cross-examination. The Ninth Circuit then applied *Crawford* retroactively to Zamora under *Teague v. Lane*, 489 U.S. 288 (1989), and affirmed the district court's grant of his § 2254 petition.

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[1] Respondent Zamora is satisfied with the presentation by petitioner of the opinions below, the statement of jurisdiction, and the constitutional and statutory provisions involved. (Supreme Court Rule 24.2, sections 1(d), (e), and (f)).

The State argues that certiorari should be granted because the Ninth Circuit's holding that *Crawford* is retroactive conflicts with the decisions of other circuits and presents a recurring issue of national importance involving habeas petitioners with Confrontation Clause claims.

Zamora replies that certiorari should be denied in his case because the Ninth Circuit's retroactivity finding was not necessary to decide that Zamora's right to confrontation was violated. The district court's holding, issued prior to *Crawford*, that the admission of Cruz's second and third statements violated *Ohio v. Roberts* provides an independent ground for the grant of Zamora's § 2254 petition and renders certiorari unnecessary in this case.

Cruz's First Statement[2] (October 6, 1999)

Cruz was shot. He made his first statement when the police arrived to investigate. He told the police he and his assailants were all members of the "Avenues" gang. Cruz said "Chayo," Sparky, Speedo's brother, and another came to his apartment and demanded money. When Cruz said he had no money, Sparky "and possibly Chayo" pulled out handguns and began shooting. There was a dispute about whether Zamora was known as "Chayo." (Pet. App. 3-4 n3, 8 n3).

Cruz's Second Statement (October 8, 1999)

Two days later, Officer Rodriquez interviewed Cruz at the hospital. Cruz looked at a book with photographs of fellow members of the Avenues gang. Officer Rodriquez testified Cruz identified a photograph of Zamora as someone he knew as "Child" and claimed he was one of the four assailants. However, Cruz refused to sign his name or circle Zamora's photograph (Pet. App. 8-9).

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[2]The admission of Cruz's first statement as an excited utterance is not at issue here.

Cruz's Third Statement (October 30, 1999)

Three weeks later, Cruz was arrested in a separate case for being a felon in possession of a firearm. He was questioned about who shot him back on October 6, 1999. Cruz told the officers he was drunk in his apartment when Sparky and Speedo's Brother came in demanding money. Zamora and Gallardo joined them. Sparky shot Cruz in the leg and Speedo's Brother shot him in the head. Cruz identified photos of Zamora and the other three assailants (Pet. App. 9-10).

The Remaining Evidence

A defense investigator testified he interviewed Cruz in custody and Cruz denied he was attacked by the defendants. Cruz claimed he was attacked by Mexican nationals who were buying drugs and insisted the four defendants were not involved (Pet. App. 12-13).

Two police gang experts testified the only nickname they knew for Zamora was Popeye and not Chayo or Child (Pet. App. 8 n3).

Zamora put on an alibi defense. His aunt and uncle testified Zamora was living in Rosarito, Mexico when Cruz was shot (Pet. App. 11-12). Another official testified Zamora had been deported from the United States in February of 1999 and had no police contacts until several weeks after the October 6, 1999 shooting (RT 1828-9).

The other eyewitness was Rodriquez, another Avenues gang member who was arrested the day after Cruz was shot. Rodriquez said he saw four guys drag Cruz into his apartment and identified Zamora from a photo as "Child." Rodriquez testified at trial that Zamora was the first person to hit Cruz but admitted on cross-examination he previously testified Zamora never hit Cruz (Pet. App. 3 n2, 8 n3, 11).

California Superior Court

On December 14, 1999, Zamora was charged with attempted murder and related charges. The prosecutor moved for the admission of Cruz's statements (1) at the scene, (2) two days later at the hospital, and (3) three weeks later after his arrest in the gun case.

There were two pretrial hearings on the admissibility of Cruz's second and third statements. The prosecutor claimed Cruz was unavailable to testify in Zamora's case because Cruz intended to exercise his Fifth Amendment right against self-incrimination in his pending gun case. The prosecutor argued Cruz's statements were reliable because they were corroborated by witness Rodriquez and there was no agreement to assist Cruz in his gun case. Defense counsel argued Cruz's statements were not reliable because they were made during police interrogation and Cruz had an expectation of leniency in his gun case (Pet. App. 15-18).

The court held Cruz's statements were admissible. The prosecutor told the jury in her opening statement the evidence would show that Cruz made statements to the police that identified Zamora as one of the persons who "had tried to kill him." (RT 913-17).

Argument resumed during trial about the admission of Cruz's statements. Cruz personally appeared and his counsel told the court Cruz would not testify because the prosecutor "is of the opinion that he would be subject to cross-examination on his case downtown if he were to testify in this matter, and that they are intertwined in a sense." (Pet. App. 17; RT 1201-06).

The court said it intended to declare Cruz was not available :

> "I don't think we needed to ask him any questions. I mean . . . we don't have to go through the drill of doing that unless I am told that I'm supposed to . . . , so unless there is some other comment, then we'll just declare that he is an unavailable witness, legally." (Pet. App. 17; RT 1202).

Zamora also argued Cruz's s[illegible]ents were not reliable and that he would be deprived of an opportunity to cross-examine his client's accuser. The court affirmed its ruling the statements were admissible (Pet. App. 18; RT 1205-06).

The officers testified about Cruz's statements and the prosecutor emphasized during closing argument and rebuttal that Cruz made statements identifying Zamora as one of his assailants (Pet. App. 32; RT 2703-09, 2765-77). The jury found Zamora guilty of attempted murder and the related counts. He was sentenced to 29 years.

California Court of Appeal

Zamora argued on appeal that his right of confrontation was violated by the admission of Cruz's statements because the prosecutor failed to meet her burden of proving that Cruz was unavailable and his statements were reliable. He also argued he was denied effective assistance of counsel because his attorney failed to preserve the Confrontation Clause issue.

Zamora's arguments were rejected in an unpublished decision (Pet. App. 46-58). The court found Zamora waived the unavailability issue because he did not object when Cruz's counsel told the court Cruz would exercise his Fifth Amendment right (Pet. App. 51-53). The court found Cruz's statements trustworthy and found trial counsel was not ineffective because Zamora's defense was arguably better than if Cruz had actually testified (Pet. App. 53-58).

California Supreme Court

Zamora filed a petition for review in the California Supreme Court raising the same Confrontation Clause issues he raised in the Court of Appeal. On January 3, 2002, the petition for review was denied without comment (Pet. App. 45).

Zamora's § 2254 Petition in Federal District Court

On April 11, 2002, Zamora filed a § 2254 petition arguing his right of confrontation was violated by the admission of Cruz's statements. On October 1, 2003, the Magistrate filed a Report recommending that Zamora's petition be granted because the admission of Cruz's second and third statements violated the Confrontation Clause (Pet. App. 6-44).

The Report found the State had not met its burden under *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), of proving Cruz unavailable. It was unreasonable to find that Cruz would incriminate himself on his subsequent felon in possession of a gun case by testifying at Zamora's trial about who shot him, particularly since Cruz admitted he possessed the gun (Pet. App. 20-25).

Even if Cruz was unavailable, the Report found that Cruz's statements were not trustworthy (Pet. App. 25-29). The state court decision "contradicted clearly established federal law by considering independent corroborating evidence (that is Rodriquez's testimony) to bolster the trustworthiness of Cruz's statements." (Pet. App. 25). Cruz had a motive to fabricate because his statements were made while he was under investigation for a firearm violation (Pet. App. 29).

The Report concluded the error was prejudicial because of the weakness of the State's case (Pet. App. 29-33). Without Cruz's second and third statements, there was little evidence Cruz identified Zamora because it was unclear whether the "Chayo" that Cruz identified in his first statement was Zamora. The other evidence linking Zamora to the offense was weak and Zamora had a credible alibi he was in Mexico when Cruz was shot. Zamora's counsel was ineffective for failing to preserve the Confrontation Clause objections (Pet. App. 34-38). On November 12, 2003, the district court adopted the Report without change (Pet. App. 5).

The Ninth Circuit's Decision

The Ninth Circuit affirmed (Pet. App. 1-4). Relying on the recently decided case of *Bockting v. Bayer*[3], 399 F.3d 1010 (9th Cir. 2005), the court found that *Crawford* applied retroactively. The court held that the decision of the California Court of Appeal in Zamora's case was contrary to *Crawford* because Zamora did not have an adequate opportunity to cross-examine Cruz (Pet. App. 3). The court next found Zamora was prejudiced within the meaning of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the State's case was weak absent Cruz's second and third statements (Pet. App. 3-4). The Ninth Circuit did not address the finding of the district court that the admission of Cruz's statements violated *Ohio v. Roberts* and its pre-*Crawford* lineage.

The State's Petition For A Writ Of Certiorari

The State's petition for a writ of certiorari argues that the Ninth Circuit's holding in Zamora's case and in *Bockting*, that *Crawford* is retroactive, has created an intolerable split among the circuit courts and presents an important issue involving thousands of state and federal habeas petitioners with Confrontation Clause claims. The State argues *Crawford* is a new rule because it overruled *Ohio v. Roberts* but that it is not a watershed rule that requires retroactive application on habeas. The State further argues that the Ninth Circuit's finding that § 2254(d)(1) incorporates the *Teague v. Lane* exceptions conflicts with the rulings of other courts.

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[3]Neveda's petition for a writ of certiorari in *Bockting* is pending (*Whorton v. Bockting*, S. Ct. No. 05-595, docketed November 10, 2005).

REASON FOR DENYING THE PETITION

CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S RETROACTIVE APPLICATION OF *CRAWFORD* WAS NOT NECESSARY TO A FINDING THAT ZAMORA'S RIGHT OF CONFRONTATION WAS VIOLATED.

Introduction

Certiorari should be denied because this case is an inappropriate vehicle to resolve the question presented by the petitioner Warden. Even assuming that this Court's review of the question proffered by petitioner is warranted, certiorari should be denied here because the district court's decision that the admission of Cruz's statements violated *Ohio v. Roberts* provides an independent ground for the granting of Zamora's § 2254 petition. The Ninth Circuit's retroactive application of *Crawford* was thus not necessary to a finding that Zamora's right to confrontation was violated by the admission of Cruz's statements.

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right to cross-examine adverse witnesses. The admission of out of court statements implicates the Confrontation Clause because the defendant is denied his right to confront his accuser.

In *Ohio v. Roberts*, the Court held that the Sixth Amendment right of confrontation does not bar admission of an unavailable witness's statement against a criminal defendant if the statement meets two tests. First, the prosecution bears the burden to establish the declarant is unavailable: "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.

Second, the prosecution has the burden of demonstrating that the statement bears adequate "indicia of reliability." *Id.* at 66. A statement is sufficiently reliable when it either (1) falls

within a "firmly rooted hearsay exception" or (2) bears "particularized guarantees of trustworthiness." *Id.*

Reliability is presumed if the statement falls within a firmly rooted hearsay exception. *White v. Illinois*, 502 U.S. 346, 356-57 (1992). The trustworthiness of a statement must spring from the circumstances giving rise to the statement and not from independent collaborating evidence. Those circumstances must render the statement "so trustworthy that adversarial testing would add little to its reliability." *Idaho v. Wright*, 497 U.S. 805, 819-21 (1990).

In *Lilly v. Virginia*, 527 U.S. 116 (1999)(plurality opinion), the Court held that the admission of the statement of a non-testifying accomplice to a police officer was inherently suspect because it shifted the blame from the accomplice to the defendant and it was "obviously obtained for the purpose of creating evidence that would be useful at a future trial." *Id.* at 125.

Finally, the Court held in *Crawford* that statements of unavailable witnesses may not be admitted unless the defendant has a prior opportunity for cross-examination. The Court held that actual confrontation is the only reliability test the Sixth Amendment permits.

It was thus firmly established prior to *Crawford* that the Sixth Amendment Confrontation Clause requires the proponent of an out-of-court statement to demonstrate that the witness is unavailable and that the statement is reliable.

As explained below, the district court in Zamora's case found, based on clearly established pre-*Crawford* law, that it was unreasonable for the state courts to conclude Cruz was unavailable or that his statements were reliable. Therefore, certiorari should be denied here because the Ninth Circuit's holding that *Crawford* is retroactive was not necessary to affirm the grant of Zamora's § 2254 petition.

Cruz's Unavailability

The issue of whether Cruz was unavailable is preceded by a procedural dispute. The state appellate court did not address the merits of the unavailability argument because it found that Zamora's trial counsel did not object when Cruz's counsel told the court Cruz would exercise his Fifth Amendment right (Pet. App. 51-53). The federal district court, in turn, held the State waived any claim that Zamora procedurally defaulted on the unavailability issue because it failed "to raise it in the answer to the petition." (Pet. App. 21-22 n9).

On the merits, the district court held the State had not demonstrated Cruz was unavailable (Pet. App. 22-25). The court found that *Ohio v. Roberts* put the burden on the prosecution to show that Cruz was unavailable. Although a defendant's invocation of his Fifth Amendment privilege against self-incrimination may render him unavailable to testify in another proceeding, the court must decide whether the witness has a "good-faith basis for invoking the privilege" because the hazard of incrimination does not arise from the "apparently inexplicable legal opinion of the arguably less than disinterested prosecutor in petitioner's case." (Pet. App. 25).

The district court next found that the prosecution failed to demonstrate that Cruz would incriminate himself on his firearm case by testifying at Zamora's trial. The prosecution failed to explain how Cruz' testimony about who shot him on October 6, 1999 would incriminate him on the charge that he possessed a firearm on October 30, 1999, particularly because Cruz had already confessed on videotape that he possessed the gun (Pet. App. 22-25).

In sum, the state appellate courts never addressed the merits of the unavailability issue so the only state court decision on that issue is the trial court's holding. The district court found it

was unreasonable for the trial court to conclude that Cruz was unavailable because his testimony in Zamora's attempted murder case was unrelated to and not admissible in Cruz's firearm case.

The Reliability of Cruz's Statements

The state appellate court held that Cruz's second and third statements were trustworthy because they were consistent with his first statement and corroborated by Rodriquez's statement. The court also noted Cruz had no motive to fabricate, was reluctant to talk to the police, subjected himself to retaliation, and never wavered in his identifications (Pet. App. 54-55).

The district court reviewed each of the above factors and found that the state courts unreasonably concluded in light of clearly established Supreme Court law that Cruz's statements possessed the requisite trustworthiness (Pet. App. 25-29). The court first found that the use of Rodriquez' testimony to corroborate Cruz's statements violated the rule of *Idaho v. Wright* and *Lilly* that the reliability of out-of-court statements cannot be established by bootstrapping other evidence (Pet. App. 25-26).

Second, the district court found it was unreasonable for the state courts to conclude that Cruz never wavered in his identification of Zamora because Cruz provided several versions of who shot him (Pet. App. 26). Cruz claimed in his first statement that Sparky and "Chayo" shot him. There was no evidence Zamora was Chayo (Pet. App. 8 n3). Cruz claimed in his second statement that "Child" shot him but refused to sign a photograph of Zamora (Pet. App. 8). Cruz claimed in his third statement that Sparky and Speedo shot him (Pet. App. -10). Cruz later recanted all his identifications during his meeting with investigator Santamaria (Pet. App. 12).

Third, the district court found that Supreme Court precedent required the prosecutor to overcome a presumption that Cruz was unreliable. However, "nothing about the circumstances

establishes that Cruz was particularly likely to be telling the truth when he made his statements to the police." (Pet. App. 27). When Cruz made his second statement two days after he was shot, he was a gang member with a record who faced new charges from the suspected drugs found in his apartment. When Cruz made his third statement several weeks after he was shot, he was in custody on the new charge he was a felon in possession of a firearm. Cruz was not under oath and had a motive to fabricate because his statements were made in response to police questioning while he was under investigation (Pet. App. 26-29).

The district court noted that *Idaho v. Wright* required the prosecutor to show that Cruz's statements were so trustworthy that cross-examination "would add little to their value." (Pet. App. 29). In Zamora's case, the district court held:

> "Considering all the circumstances, it is not reasonable to conclude that cross-examination of Cruz would be of marginal utility. To the contrary, there would be great utility in testing Cruz's version of events by cross-examination." (Pet. App. 29).

The Prejudice To Zamora And The Ineffectiveness Of Trial Counsel

The state appellate court did not make a specific finding about whether Zamora was prejudiced by the admission of Cruz's statements and, as a result, there is no state court decision on prejudice entitled to deference. However, in finding that trial counsel was not ineffective for failing to preserve the Confrontation Clause issue, the state court did find that Zamora's defense may have benefitted from the admission of Cruz's statements because the inconsistencies among them were made apparent to the jury without "without the risk Cruz would explain the inconsistencies in live testimony." (Pet. App. 57-58).

The district court concluded that Zamora was prejudiced by the Confrontation Clause error because of the weaknesses in the State's case (Pet. App. 29-33). In the absence of Cruz's second and third statements, there was no evidence Cruz ever identified Zamora because his first statement implicated Chayo and it was not established that Zamora was Chayo. The other evidence linking Zamora to the crime was weak and Zamora had a credible alibi defense he was in Mexico when Cruz was shot. The court concluded the admission of Cruz's statements had a substantial effect on the verdict. The court also found trial counsel ineffective because he failed to raise Confrontation Clause objections to the admission of Cruz's statements (Pet. App. 34-38).

Conclusion

The district court relied on well established pre-*Crawford* Supreme Court cases and held it was unreasonable for the state courts to conclude that Cruz was unavailable or that his second and third statements were reliable. Therefore, the Ninth Circuit's retroactive application of *Crawford* was not essential to a finding that Zamora's right of confrontation was violated by the admission of Cruz's statements. As a result, it is not necessary in Zamora's case to resolve the conflict among the circuit courts about whether *Crawford* is retroactive. The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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